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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-17

BERNARD G. RUBIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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BERNARD G. RUBIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Opinions Below.

The initial opinion of the court of appeals is reported at 559 F.2d 975 (5th Cir. 9/22/77). A copy of that opinion is attached in our Appendix (App. A). Thereafter, upon confession of error by the Solicitor General, this entire matter was remanded to the court of appeals. See ..... U.S. ....., 99 S.Ct. 67 (1978). The second opinion of the court of appeals is reported at 591 F.2d 283. A copy of that opinion is attached in our Appendix (App. B).

On June 1, 1979, the court denied both the government and petitioner's respective Petitions for Rehearing. On June 13, 1979, the court of appeals denied a petition for stay of mandate. Petitioner filed a motion to recall the mandate of June 27, 1979.

Jurisdiction.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented.

1. Whether the impeachment of defense witnesses by eliciting and commenting upon their prior invocation of the privilege against self-incrimination before a federal grand jury is error of constitutional magnitude, or is simply a violation of evidentiary canons, subject only to the lesser harmless error standard of *Kotteakos v. United States,* 328 U.S. 750, 764-75 (1946), rather than the constitutional harmless error standard of *Chapman v. California,* 386 U.S. 18 (1967).

2. Whether petitioner's entire convictions should have been reversed due to the improper exclusion of critical state of mind evidence.

3. Whether the Indictment should have been dismissed for failure to record the grand jury proceedings, despite timely pre-indictment request.

Summary of Proceedings.

After a two week jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on 103 counts of a 105 count indictment. The indictment was multifaceted, but stemmed from two different government theories. The first 86 counts dealt with allegations that petitioner, a union official, had engaged in multiple duplicate billings to the union entities and trust funds. Correlatively, two income tax evasion counts were predicated on the theory that petitioner had failed to report the monies obtained from the allegedly improper reimbursement.

Similarly, five racketeering counts (See 18 U.S.C. §§130-141) rested upon the alleged duplicate billings, contending that the acts constituted racketeering.

The duplicate billing counts constituted approximately $55,000 of the monies allegedly embezzled. The vast bulk of the monies alleged embezzled, *i.e.,* approximately $330,000, were contained in the two counts (Counts 87 and 88) which contended that petitioner engaged in unauthorized salary increases, not pursuant to the respective union constitution and thus, according to the government's theory, not in accordance with the law.

In our initial appeal to the court of appeals, we urged *inter alia* that the trial court had improperly excluded critical testimony relating to petitioner's mental state. The court pretermitted review by invocation of the concurrent sentence doctrine.

We thereafter urged in a supplemental petition for rehearing that the court had improperly invoked the concurrent sentence doctrine in this case. Upon the candid confession of error by the solicitor General, the matter was remanded to the court of appeals.

Upon remand, the court of appeals accepted our argument that indeed, the trial court had improperly excluded critical evidence pertaining to the salary increase counts and thus reversed those two counts. The court, however, rejected our contention that petitioner's entire conviction should be reversed because the jury was deprived of critical state of mind evidence which may easily have affected their consideration of petitioner's state of mind on the other counts. We deal with these issues *infra.*

Statement.

On October 2, 1975, after a two-week jury trial in the United States District Court for the Southern District of Florida (Honorable Peter T. Fay, presiding), petitioner was convicted on 103 counts of a 105 count Indictment charging embezzlement (29 U.S.C. §501(c); 18 U.S.C. §664), racketeering (18 U.S.C. §1962(c)), false statements on tax returns (26 U.S.C. §7206(1)) and failure to keep labor union records (29 U.S.C. §§436 and 439).

At the time of the alleged offenses,[1] petitioner was an official of the Laborer's International Union of North America ("LIU"). He was President of the Southeast Florida Laborer's District Council, President of Local 666 of the Concrete Products and Material Yard Workers, Business Manager of LIU Local 478, and Special International Representative (R. 1-2).[2]

Counts 1 through 86 alleged separate instances of embezzlement from the labor organizations and trust funds. The gist of these offenses was that petitioner had engaged in multiple duplicate billings to the respective entity for expenses incurred. The government's theory was that petitioner embezzled the monies of the respective labor organizations or employee welfare benefit plan by causing the entity to pay for alleged

[1]We do not expect the government to dispute our contention that on October 3, 1977, petitioner resigned all his union and trust fund positions and that in modification of his bond pending the resolution of this Petition consented to the imposition of proscriptions restraining him from exercise of control over any labor union or trust fund affairs or receipt of any monies or property from any union or trust fund.

[2]"R" is a reference to the Clerk's Record. Reference solely to number will hereinafter be used as a reference to the Reporter's Transcript.

items(s) of expenses knowing that the expense had been paid or would be paid by another labor organization (and/or employee welfare benefit plan).

Correlatively, Counts 97-99 alleged false subscribing of federal income tax returns for the calendar years 1972, 1973 and 1974, respectively (R. 127-129). The government's theory was that the excess reimbursement received from the multiple billings was not disclosed on petitioner's federal income tax returns.

Counts 87 and 88 alleged that during the approximate four year period covered by the Indictment, petitioner embezzled $178,701.00 and $150,330.00 from Local 666 and the District Council, respectively, by causing the respective labor organization "to pay him unauthorized salary increases." (R. 123).[3]

Counts 89 through 96 alleged that appellant failed to keep adequate union records (R. 124-126).

Counts 100-105 alleged that appellant conducted the activities of the respective labor unions and trust funds through a pattern of racketeering activity in violation of 18 U.S.C. §1962 (R. 130-141).[4]

[3]The government's theory on these counts was that petitioner had engaged in criminal conduct by failing to follow the procedures prescribed by the local union and district council constitutions for raising salaries. Petitioner contended that his salaries were raised pursuant to these constitutions and that in any event, the responsible officers and delegates had properly delegated authority to him to set all salaries. On appeal, petitioner argued that the jury was erroneously instructed *inter alia* on civil fiduciary standards which effectuated strict liability in this criminal case. The court of appeals invoked the concurrent sentence doctrine to refuse to review petitioner's contentions (*Id.* at 990, f.n. 14, App. A). Upon remand from this Court, the court of appeals accepted our argument that critical evidence had been improperly excluded.

[4]The "racketeering activity" alleged was the various acts of embezzlement charged in Counts 1 through 89 (R. 130-141).

With respect to the "multiple" billing counts (Counts 1 through 86) petitioner did not challenge the government's contention that the various vouchers, airline tickets, charge card expenditures, etc., admitted into evidence by the government constituted requests for overlapping expenses.

On the "multiple billing" trust fund counts, the government introduced evidence that on the various trust funds each trustee would receive advances to attend educational conferences occurring one or two times per year (R.T. 287, 305-306, 402). In each instance, petitioner was voted the monies that he received (R. 298, 407).

The management trustees related that they had been advised by both the trust fund attorney and the trust administrator that if they did not spend the full allotted amount, they did not have to return the excess but should report any excess on their income tax returns (296, 300, 419, 582-583, 621-622).[5]

The trusts' administrator, who served all the respective trust funds, issued the advances to petitioner with the knowledge that petitioner was receiving multiple advances (394-395).

In his defense, petitioner conceded the existence of his practice of multiple reimbursement. Petitioner detailed without contradiction that he would invariably cash the reimbursement checks; the proceeds would be received in cash and would not be deposited to any savings account, checking account or investment (1176-1179). Additionally, petitioner would cash most

[5]Petitioner was also informed by the trust fund's attorney that any excess could be spent for legitimate union purposes (1220, 1215).

of his personal salary checks received from Local 478, which proceeds were used for his personal living expenses (1179).[6]

Petitioner explained that he spent the cash generated by the multiple reimbursements for union-oriented activities, primarily organizing expense.[7] As petitioner explained (1175-1176):

> Ever since late '68, '69 when our organizations reached financial strength, I accumulated this cash. I always accumulated a cash fund and was always spending cash.
>
> * * *
>
> I was on salary from two different organizations which is proper in the labor movement. I saw no impropriety with drawing expenses from each one of the organizations on which I was on salary. Each time I drew expenses from the organizations, each organization was getting a full measure of service.
>
> I was representing each organization and drew reimbursed expenses. The excess of the reimbursed

[6]Petitioner argued that this supported his defense that he used the monies obtained from multiple reimbursements for union-oriented purposes. He contended that if, indeed, he considered the proceeds from the union-expense money as his own, he would not have needed to cash the salary checks for his own personal expenses.

[7]Petitioner described examples: He would give cash to the organizers. If the union wanted to organize a subcontractor, in order to induce people into the union, the organizers would go into the shop and pick out one, two or three people they considered to be leaders in that subcontractor's organization and seek to enlist their help. These "independent contractors" would seek remuneration for their services in enlisting people to join the union. The organizer would pay $20-$30 for each person signed up (1171-1172).

expenses was converted into cash and this cash was used to organize the unorganized.

To my belief, there was never a cent of cash received from these reimbursed expenses that was not spent for the benefit of the Union with which I am involved.

Petitioner described how cash was paid out during strikes because the striking employees could not receive unemplomentbenefits and had no other sources of income (1174).

Petitioner also testified that he paid large amounts of cash to entertain contractors (1182). Because he was dealing with executives of multi-million dollar corporations, he tried to deal with them on their own level (1189). Similarly, by cultivating friendships with other union officials and entertaining them, he could enlist their aid when it would be beneficial to the union (1183-1186).

With respect to the trust fund conferences, petitioner believed that they were one of the greatest encouragers of peaceful, harmonious labor-management relations. Whenever he received excess cash reimbursement, the cash went into his cash organization fund (1207-1211). Petitioner believed that this provided the ultimate benefit to the member.[8]

Prior to the first conference attended by petitioner, the attorney for the trust funds advised him that it would be proper to receive advances from each fund

[8]Petitioner described, for example, how a $4,000 cash expenditure for organizing at the Aventura Project, a high rise project in Miami, Florida, resulted in the acquisition of approximately 40 members. As a result, the trust fund would receive $104,000 per year in contributions in return for the $4,000 spent to acquire the new members (1213-1214).

and that if there were excess reimbursement, the money could properly be spent on legitimate union purposes (1220, 1215). Petitioner was aware that the attorney, and indeed the administrator, were also voted advances from each fund on which petitioner was a trustee (1227, 1229).

It was stipulated that petitioner disclosed all amounts he received from salary and reimbursed expenses from each labor organization on the LM-2 reports filed with the Department of Labor (1232-1233).

Several individuals corroborated petitioner's expenditure of cash for union-oriented purposes. We argue *infra* that the government committed constitutional error in cross-examining District Council organizers Kenton L. Wells and Jack Gordon. For purposes of cohesiveness, the summary of the testimony of those witnesses is found in a latter portion of this statement of fact (*infra* at pp. 12-15).

Larry Feder, an organizer for Local 666, estimated that since 1971, petitioner had provided him with $35,000 to $40,000 in cash for organizational expenditures (1582-1583). Feder described these expenditures which included large cash outlays during a three month strike at the Carriage House Hotel in Miami Beach (1564-1584). Feder also observed petitioner entertaining with cash and carrying large amounts of cash. When Feder questioned petitioner as to the wisdom of carrying around large amounts of money, petitioner told him that during the course of his daily routine, which included entertaining and organizing, it was necessary to have large amounts of cash (1571-1572).[9]

[9]Feder testified that this conversation occurred at Capra's Restaurant in Miami and that petitioner paid cash for enter-

(This footnote is continued on next page)

Several laborers corroborated significantly lesser expenditures of cash. One Lucius Smith not only observed petitioner spend cash on several occasions, but also personally received $2,400 which he then used to enlist others to help him in organizing (1628-1632). Jake Wright, a Local 478 business agent and District Council organizer, testified that in addition to the cash monies he had observed petitioner spend on many occasions, he had received $2,000 in cash to pay for organizing. He paid this cash to one Ulysses C. Edwards (1677-1680). Edwards corroborated Wright's testimony (1698-1700).

Jerry Schwartz, Executive Vice President of the County National Bank of North Miami, where petitioner maintained both personal and union accounts, recalled that he had often observed petitioner present checks for cashing. When Schwartz asked petitioner to deposit the checks rather than cash them, petitioner told him that he needed the cash (1654-1655). Schwartz also recalled that in 1971 he was contemplating constructing a building project as a non-union project and when he spoke to petitioner, he was advised that petitioner's union was establishing a fund for organizing and would strike the project (1656).

Petitioner's expenditures of cash for entertaining was also corroborated by Joseph Fanti, a contractor, and Ralph DeMeo, a contractor and President of the Florida Home Builders Association. Each testified that during the many years they had known him, petitioner had

taining that evening (1572). Vincent Bruno, the owner of Capra's, called as a government witness, testified that on many occasions petitioner would come to the restaurant with union people and pay the bill with cash rather than charging it to the union (824-826). These bills would range from $70.00 to $150.00 (828).

entertained them on many occasions; each had seen petitioner expend cash for this purpose (1549-1557; 1706-1715).

On appeal, petitioner urged *inter alia* that the trial court committed constitutional and evidentiary error by allowing the prosecutor to elicit the prior invocation of the Fifth Amendment by two witnesses and that the prosecutor egregiously compounded the error by his closing argument.[18]

Two extremely important defense witnesses were union organizers Kenton Wells and Jack Gordon. The government's cross-examination and closing argument impugning the credibility of these two witnesses form the basis of our argument of error.

Wells, a District Council organizer and co-Mayor of the City of Opa-Locka, Florida, testified that as an organizer, he would attempt to solicit men to join the organization (1504).

With respect to the organizing of one specified construction project, petitioner provided him with at least $5,000 in cash (1509-1510). For other union purposes,

[10]In addition to the arguments presented here, petitioner also argued that the conviction should be reversed because of (1) the exclusion of highly important evidence due to an incorrect view that the evidence constituted hearsay; (2) the deprivation of a fair trial by the improper use and subsequent jury instruction on codified federal civil law on fiduciary responsibility and exculpatory resolutions; (3) improper conviction of "racketeering" under 18 U.S.C. §1962; (4) the impropriety of the order of forfeiture of petitioner's union and trust fund positions; (5) the failure to allow an adversary hearing into allegations that the government's case was the product of illegal activity; and (6) the attendance of unauthorized persons before the grand jury. The court rejected the latter four contentions; the court determined to apply the concurrent sentence doctrine to foreclose consideration of the former two issues.

petitioner had provided him with approximately $7,000 over the previous five years (1510-1513). Additionally, he observed petitioner spend large amounts of cash on entertaining for union purposes (1506, 1516-1517). Wells explained that in organizing a plant, it is necessary to pick out the key people to be influential in bringing other people into the membership. Sometimes it is necessary to compensate these people for their work (1513). Most often these people are paid by cash (1513-1514); it is also necessary to pay their bills while they are working (1514). Wells also explained that he paid cash provided by petitioner for work lists, addresses and telephone numbers (1514).

Jack Gordon, an organizer for Local 666 and the District Council, testified that over the past four years he had incurred entertainment expenses of approximately $150.00 per month at the Jockey Club and that petitioner gave him the required cash to pay these bills. Additionally, petitioner would reimburse him in cash for out-of-pocket expenses of approximately $1,500.00 per year (1616). Thus, over the past four years petitioner had provided him with approximately $13,000.00 in cash (1617).[11]

Prior to the cross-examination of Wells, defense counsel approached the bench in an effort to avert the problem (1518-1519):

> Mr. Flax [defense counsel]: Your honor, we have another one of these anticipated problems.

[11]Gordon explained that the reimbursement for out-of-pocket expenses of approximately $1,500 per year was incurred for entertainment of contractors, meals, hotel rooms and football tickets.

> Rather than have the question asked, it is my understanding that Mr. Wells took the Fifth Amendment in the grand jury. Am I correct?
>
> Mr. Steinberg [Prosecutor]: That's correct.
>
> Mr. Flax: I want to inquire just how we are going to go into it. I think it is highly improper. I don't want to just stand up and object. I do want to try to head if off.
>
> Mr. Steinberg: I intend to go into it. I intend to ask him if he answered those questions in any different manner on the previous occasion.
>
> The Court: I will overrule the objection.

Thereafter, the prosecutor commenced his cross-examination of the witness by eliciting that Wells had invoked the Fifth Amendment before the federal grand jury.[12]

[12]The relevant portions of the examination were as follows (1519-1524):

[1519]

Mr. Steinberg: Q. Mr. Wells, I notice that Mr. Flax asked you your occupation.
A. Yes, sir.
Q. Have you ever given a different response on a previous occasion?
A. Not that I know of as far as my occupation. No I don't.

* * *

Q. Did you testify in the Federal Grand Jury on April 29, 1976, Sir?
A. This year?
Q. That's correct.
A. No, Sir, I didn't.
Q. You did not?
A. I came before the Federal Grand Jury.
Q. Were you asked this question:
"Q. What is your occupation?"
A. I was asked that question.

* * *

[1521]

Q. After you gave your address were you asked your occupation?
A. Yes.

(This footnote is continued on next page)

Similarly, over objection, the prosecutor elicited from Jack Gordon that he had previously refused to testify (1622-1623).

The guise under which the prosecutor elicited the invocation of the Fifth Amendment by these witnesses was that the refusal to testify at the grand jury was inconsistent with testifying as a defense witness at trial. Then, in closing argument the prosecutor argued (1911).

> Jack Gordon, Mr. Jack Gordon—you saw him sitting up there. He is another one of the fat cats. He is living off the sweat of these laborers. You heard how much money he was getting, and when he was given an opportunity to testify at the grand jury, what did he do? He refused to testify about the same matters. Why?
>
> If his testimony would have exculpated Mr. Rubin, it would have meant that we would not be here today. Why would he not have offered it? Why would he not have told us?

Q. Did you give the same response that you gave Mr. Flax?
A. No, Sir. I took the Fifth Amendment.
Mr. Flax: May we approach the bench, Your Honor?
The following colloquy occurred at the bench (1521-1522):
Mr. Rosenfield: Your Honor, I would suggest that because the man answered the question before the grand jury that he refused to answer on the ground that it might tend to incriminate him, this would be improper and highly prejudicial. There is nothing inconsistent about a witness trying to invoke the Fifth Amendment in front of a grand jury and testifying here. There is nothing inconsistent about that at all. This kind of questioning is improper.

* * *

The Court: I have overruled your objection. You can certainly bring out that he refused to testify before the grand jury. I think that is proper cross-examination.

With the Court's express sanction, the prosecutor then continued to elicit that Wells had never told the government about the cash received from petitioner (1523-1524).

> He never told the government about any cash pool. He had an opportunity and he submitted bills for organizing.

Addressing himself to Kenton Wells, the prosecutor argued to the jury (1914):

> Now, Mr. Kenton Wells,
>
> * * *
>
> What did he do when he got to the grand jury and was given an opportunity to testify about Mr. Rubin? If he had something to exculpate Mr. Rubin, to say Mr. Rubin was a good guy, he did the right thing, he followed the law, why did he not say it? Why did he not say it? Why is he a willing witness now and not a willing witness then?

Defense Counsel moved for a mistrial based on the improper comment on the exercise of the Fifth Amendment by these witnesses (1959). The motion was denied (*ibid.*).

In rebuttal argument the prosecutor reiterated his same theme (2043-2044).[13]

> Now, Mr. Rosenfield also said that they had witnesses come in here and tell us about this money and where it went and you cannot disbelieve them. I would argue with that. This is what a jury is for, and that is what the Judge will tell you a jury is for. You are here to judge the credibility of these witnesses. You use your common sense. You use every test you use to test the credibility of your friends, your neighbors,

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[13]The defense, however, did not in any manner address itself in closing argument to the prior invocation of the Fifth Amendment by the witnesses.

people you do business with, your insurance people. Use your common sense.

If you ask a man something last year about something that happened before that and he refuses to tell you, he refuses to tell you about that, why is it changed a year later when he is here a year later testifying for Mr. Rubin on the witness stand and all of a sudden he is a volunteer? Why does it change?

You ask yourself, if you ask a man a question a year ago and he says, "X," and then he comes here to this witness stand under oath and says, "Y," you judge for yourself. You are the judge of the credibility of these witnesses. You do not have to accept what the Government witnesses say at face value. You do not have to accept what the defense witnesses say at face value. You are the sole judges of the credibility of these witnesses. I cannot tell you whether they lied or not. That is not my decision. Mr. Rosenfield cannot tell you that. That is your decision. You use the fact you have at hand to determine whether they were credible and if they have a motive, if they have a motive for testifying.

On appeal, the Fifth Circuit validated petitioner's claim that the impeachment of these witnesses was error. The court considered that argument to be a "most troubling challenge to the validity of the conviction . . ." (559 F.2d at 979, App. A). Drawing upon the teachings of this Court in *Grunewald v. United States*, 353 U.S. 391 (1975); *United States v. Hale*, 422 U.S. 171 (1975) and *Doyle v. Ohio*, 426 U.S. 610 (1976), the court concluded that the

district court had "violated evidentiary canons by permitting such impeachment." (559 F.2d at 979, App. A). The court specifically held (*Id.* at 983, App.A):

> A defense witness's prior refusal to supply testimony to a grand jury before which he had a reasonable belief that he might be a defendant himself has no proper significance as impeachment evidence. Use of the evidence for that purpose risks prejudice. Accordingly, we hold that the government may not attempt to impeach a defense witness by eliciting such a prior refusal to testify before a grand jury [Footnote omitted.]

Aligning itself with the Eighth Circuit decision in *United States v. Williams*, 464 F.2d 927 (8th Cir. 1972) and the Second Circuit decisions in *United States v. Glasser*, 443 F.2d 994 (2d Cir. 1971); *United States v. Tomaiolo*, 249 F.2d 683 (2d Cir. 1957) and *United States v. Natale*, 526 F.2d 1160 (2d Cir. 1975), the court nevertheless adopted a perspective not voiced by those other Circuits—by concluding that the error was not of a constitutional nature, thus allowing the harmfulness ot be assessed under the lesser standard of *Korteakos v. United States*, 328 U.S. 750, 764-765 (1946) rather than the stricter standards applied to constitutional error. *Chapman v. California*, 386 U.S. 18 (1967).[14]

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[14]No other circuit has drawn such a distinction. In *United States v. Williams, supra*, the Court rejected the government's contention of harmless error without discussion as to the standard employed by the court. Similarly, neither *Glasser, Tomaiolo* nor *Natale* focused on this aspect.

In weighing the purported harmfulness of the impeachment, the court apparently carefully avoided opining upon the result it would reach if it were determined that the constitutional harmless error standard was applicable. In applying the less stringent *Kotteakos* standard, the court concluded that on balance the error was probably not sufficiently harmful to require reversal. We argue *infra* that the court applied on erroneous standard in assessing the error's potential harmfulness and should have applied the standard applicable to constitutional violations. Moreover, we urge that irrespective of the applicable standard, the prejudicial impact of the prosecutor's actions require the granting of the Petition for Writ of Certiorari and reversal of the Court of Appeals' decision.

ARGUMENT.

I

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE PROSECUTOR'S MISUSE OF THE PRIOR INVOCATION OF THE FIFTH AMENDMENT BEFORE THE GRAND JURY BY IMPORTANT DEFENSE WITNESSES WAS NOT ERROR OF CONSTITUTIONAL DIMENSION.

A. The Court Below Correctly Concluded That the Cross-Examination and Comment Upon the Prior Exercise of the Fifth Amendment Was Error.

As a preliminary matter, we present a brief analysis of the nature of the error which occurred below. We then turn to a consideration of the proper standard to be employed in assessing the prejudicial impact.

The error which was permitted by the district court was not the result of an inadvertent or isolated act of the federal prosecutor. The defense attempted to avert the error; indeed, the defense asserted the proper legal objections prior to the interjection of the impermissible evidence. The prosecutor, with the express sanction of the court, made a considered judgment not only to elicit the prior invocation of the Fifth Amendment by these witnesses, but also to vigorously argue to the jury the precise inference which the law wisely condemns. Moreover, the prosecutor's own determination of the importance of destroying the credibility of these particular witnesses is reflected in his statement to the jury concerning witness Gordon (1911):

> If his testimony would have exculpated Mr. Rubin, *it would have meant that we would not be here today*. Why would he not have offered it? Why would he not have told us? [Emphasis added.]

In our view, the prosecutor's vociferous reliance on these witnesses' prior invocation of the Fifth Amendment in order to destroy their credibility totally deprived petitioner of a fair trial.

Proper analysis requires the initial recognition that the government did not at any time purport to claim in the courts below that either witness improperly asserted his personal privilege against self-incrimination when he appeared as a witness before the grand jury. There is no suggestion in this record—nor could there be—that *at the time the witnesses appeared before the grand jury that their respective assertions of privilege were anything but proper and for their own personal protection.*[15] It is an elementary principle of our jurisprudence that the privilege is purely personal; it cannot legitimately be asserted to protect or shield others from inquiry into their affairs. The notion that the "public has right to everyone's evidence," *Kastigar v. United States,* 406 U.S. 441, 443 (1972), is firmly imbedded.

When the government's interest in acquiring testimony conflicts with the witness's privilege against self-incrimination, the government is entitled to obtain immunity for the witness, thus removing the witness's fear of self-incrimination and securing the witness's testimony. See 18 U.S.C. §§6002, 6003.

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[15]The court of appeals reached the same conclusion in observing (559 F.2d at 982, App. A):

> "Insofar as the record reveals, the two witnesses also could have been justified in the conclusion that they were being interrogated for the express purpose of supplying evidence against themselves. They, of course, could invoke the privilege properly only to avoid incriminating themselves: the government has never levied the charge that either improperly claimed the protection of the fifth amendment."

Even if the government does not desire to grant immunity, nevertheless where persons improperly invoke the Fifth Amendment for protection of others, the government is still not without remedy. Since the privilege does not exist to protect others, but exists only where there is a " 'real and appreciable' and not merely 'imaginary and unsubstantial' hazard of self-incrimination," *Marchetti v. United States,* 390 U.S. 39, 48 (1968), the government has the power to seek contempt sanctions for those who improperly assert the testimonial privilege. Although the privilege "guarantees the right to remain silent absent immunity," *Garner v. United States,* 424 U.S. 648, 96 S.Ct. 1178, 1182 (1976), nevertheless:

> [u]nless the government seeks testimony that will subject its maker to criminal liability, the constitutional right to remain silent absent immunity does not arise. An individual therefore properly may be compelled to give testimony, for example, in a noncriminal investigation of himself. See *e.g. Gardner v. Broderick,* 392 U.S. 273, 278 (1968).

Garner, supra. The Fifth Amendment cannot be used to shield third persons. *Couch v. United States,* 409 U.S. 322, 328 (1973); *Hale v. Henkel,* 201 U.S. 43 (1906). A prospective grand jury witness, who is unsure of the depth and scope of the grand jury investigation, has the constitutional prerogative of protecting himself by assertion of the privilege. "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances," *Slochower v. Board of Higher Education,* 350 U.S. 551, 557-558 (1956).

When these witnsses appeared before the grand jury and invoked the Fifth Amendment, if the invoca-

tion of the privilege was improperly oriented to shield petitioner rather than for personal protection, the government had the power to compel the testimony—by attempting to invoke the contempt sanction. As the *Garner* court stated (424 U.S. 628, 96 S.Ct. 1178, n.11):

> As we have noted, the privilege is an exception to the general principle that the Government has the right to everyone's testimony. A corollary to that principle is that the claim of privilege ordinarily must be presented to a "tribunal" for evaluation at the time disclosures are initially sought. This early evaluation of claims allows the Government to compel evidence if the claim is invalid or if immunity is granted and therefore assumes that the government obtains all the information to which it is entitled.

There was simply no suggestion made to the trial court that at the time these witnesses invoked their Fifth Amendment privileges that there was anything improper about their respective assertions of privilege. If the government believed otherwise, the remedy was to seek the court's aid to compel answers to specific questions. See *Hoffman v. United States,* 341 U.S. 479, 71 S.Ct. 814 (1951); Cf. *In re Investigation Before April 1975 Grand Jury,* 403 F.Supp. 1176 (D.C. Cir. 1975), vacated 500 F.2d 600 (D.C. Cir. 1976).[16]

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[16]In *In re Investigation,* 19 witnesses acting on the advice of an attorney with potentially conflicting interests invoked the Fifth Amendment to even innocuous questions, and the district court disqualified the attorney, requiring separate representation. The Court of Appeals vacated the disqualification order and instructed the government to cure any suggestion of impropriety by challenging any unwarranted claims of privilege.

One of the essential vices of the error committed by the government was its total failure to offer any evidence that there was anything improper about the witnesses' assertion of their privilege. Yet, the only way in which the argument that the government made would acquire any probative force whatsoever, would be if the invocation of the privilege at the grand jury stage by the witnesses was unjustifiable. "[T]o be admissible, keeping silence must be much more than ambiguous." *United States v. Fairchild,* 505 F.2d 1378, 1383 (5th Cir. 1975). Moreover, in closing argument, the prosecutor truly perverted justice when he invited the jury to join him in speculation as to why the witnesses would have invoked the Fifth Amendment before the grand jury, then later testify at petitioner's trial. The prosecutor asked the jury to infer that they acted to shield petitioner at the grand jury stage. The record, of course, was totally devoid of any such evidence, and indeed every permissible inference is to the contrary.

In *Grunewald v. United States,* 353 U.S. 391 (1957), reaching the conclusion that the invocation of the privilege lacked probative value as impeachment of trial testimony, the Court "emphasized anew that one of the basic functions of the privilege is to protect *innocent* men." (Emphasis in original) 353 U.S. at 421, and that (*id.* at 422):

> [T]he Fifth Amendment claim was made before a grand jury where the witness was a compelled and not a voluntary witness; where he was not represented by counsel; where he could summon no witnesses; and where he had no opportunity to cross-examine witnesses testifying against him. These factors are crucial in weighing whether a

> plea of the privilege is inconsistent with later exculpatory testimony on the same questions, for the nature of the tribunal which subjects the witness to questioning bears heavily on what inferences can be drawn from a plea of the Fifth Amendment. [citation omitted]. Innocent men are more likely to plead the privilege in secret proceedings where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedure provide safeguards for the establishing of the whole as against the possibility of merely partial truth.

The *Grunewald* majority rested the decision on evidentiary grounds. Nevertheless, four members of the Court would have rested the decision squarely on constitutional grounds (353 U.S. at 425-426).

Then, in *United States v. Hale*, 422 U.S. 171 (1975), the Court rejected the government's contention that it could permissibly cross-examine a defendant by eliciting his prior silence at the time of arrest. Resolving the issue on evidentiary grounds, the Court concluded that "[i]f the Government fails to establish a threshold inconsistency between silence . . . and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded." (*Id.*, at 176).

Finally, only last term, in *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976), the Court reached the issue left open by *Hale* and concluded that it was error of constitutional magnitude to allow a state prosecutor to impeach a testifying defendant by inquiry as to the defendant's post-arrest silence. The Court recognized that silence in the wake of *Miranda* warnings

(*Miranda v. Arizona*, 384 U.S. 436 (1966)) is "insolubly ambiguous" (96 S.Ct. at 2244).

The court below properly rejected the government's argument that the prosecutor's cross-examination and closing argument were permissible. Relying upon this Court's teachings as well as the decisions of the Second and Eighth Circuits, the court recognized the invalidity of the government's reasoning (559 F.2d at 983):

> The conclusion . . . that a defense witness's prior silence before a grand jury and trial testimony exculpating the defendant lack sufficient inconsistency to justify impeachment use of the silence is well-founded. *Grunewald* teaches that the many factors that may lead an individual to remain silent before the grand jury make it impossible to draw any reasonable inference that a subsequent protestation of his own innocence has been fabricated. Assuming a reasonable belief at the time of the witness's grand jury appearance that he himself may be a defendant, any suggestion of inconsistency between his silence and subsequent testimony exculpatory of someone else can certainly be no stronger.

In our view, it was no less "fundamentally unfair" to allow the prosecutor here to benefit from the prior invocation of the privilege by these witnesses than in *Doyle* where this Court recognized the fundamental unfairness attendant to the inquiry into silence following *Miranda* warnings.

There is simply no justification for allowing the inquiry and argument sanctioned by the trial court. This entire area of inquiry and argument was patent error striking right to the very essence of petitioner's

defense at this jury trial. The court in no way interfered with this approach by the government despite fervent objection. Moreover, no cautionary instruction was given, nor could one have cured the egregious error. We turn, then, to a consideration of the standards to be applied in assessing the harmfulness of the error which occurred.

B. The Court Applied an Erroneous Standard by Concluding That the Error Was Merely Evidentiary and Did Not Rise to Constitutional Proportion.

The court of appeals committed serious error in concluding that a prosecutor may elicit a prior invocation of the Fifth Amendment before a grand jury by important defense witnesses, and thereafter comment upon the exercise of that privilege as indicative of the defendant's guilt without running afoul of any constitutional protection.

The reasoning that constitutional values were not involved allowed the court to escape the application of the harmless error standard enunciated by this Court in *Chapman v. California,* 386 U.S. 18 (1967), which would have required the court to conclude that the error was harmless "beyond a reasonable doubt." Instead, the court below applied the less stringent standard of *Kotteakos v. United States,* 328 U.S. 750 (1946) in attempting to calculate the harmlessness of the error.

This case thus presents to this Court an issue of critical importance. If, as the court below contends, there is no constitutional bar to the impeachment use of protected silence, then there is no bar to the unchecked proliferation in the state courts of such impeachment tactics. As this Court noted in *Burgett v. Texas,* 389 U.S. 109, 113-114 (1967):

> The states are free to provide such procedures as they choose, including rules of evidence, provided that none of them infringes a guarantee in the federal Constitution.

See also, *Dutton v. Evans,* 400 U.S. 74 (1970); *California v. Green,* 399 U.S. 149 (1970).

The danger to the exercise of the privilege against self-incrimination, if the decision of the court below is permitted to stand, is best illustrated by the recent decision in *Doyle v. Ohio, supra,* in which this Court concluded that the use of a defendant's post-arrest silence to impeach was indeed a constitutional violation and not merely a breach of evidentiary rules; this constitutional holding was finally necessitated by the failure of state courts consistently to exclude such evidence based on evidentiary canons. The *Doyle* court specifically reserved the question of whether constitutional error would obtain upon the use of post-arrest, post-*Miranda* warning silence to impeach a defense witness rather than the defendant (426 U.S. at 6).

The acceptance of the expedient rule adopted below will thus put this Court's *sub silentio* imprimatur on a practice which would allow state prosecutors to call all potential defense witnesses before a grand jury, advise them that they are targets of an investigation, thus obtaining an invocation of the privilege against self-incrimination and thereafter proceed, secure in the realization that if those persons appear as defense witnesses, the prosecutor may permissibly seriously impugn their credibility by eliciting and commenting upon their prior invocation of the privilege. *Cf. Glasser v. United States, supra.* Moreover, federal prosecutors will be secure in the knowledge that they too may engage

in the condemned practice and will not be reversed upon appeal unless the defense successfully persuades the appellate court that the error affected the verdict under reviewing standards less strict than the applicable standard for constitutional violations.

In our view, the error of such a practice rises to constitutional dimensions and is equally repugnant to constitutional values irrespective of whether the forum is state or federal. Because of the exceptional importance of this issue—and the wide-ranging impact which its resolution will have on the conduct of both state and federal trials within the Nation—this case presents a paradigmatic one for granting the Petition for Writ of Certiorari.

The decision below reflects an ill-advised determination that requires remedial action by this Court. The potential for abuse of the rule adopted below is manifest. The court ignored this potential in observing (559 F.2d at 984, n.7):

> Beyond the unfairness of exploiting a claim of the privilege, we cannot conclude that the grand jury silence of a defense witness is so utterly lacking in probative value yet highly charged with prejudicial potential that its use merits universal constitutional condemnation.

Adherence to notions of fundamental fairness strongly suggests that this is not a proper area to allow disparate rules throughout the states. Uniform condemnation of the practice is constitutionally required.

The error committed below was of far greater import than a simple violation of evidentiary canons. The tactic used by the prosecutor in the instant case is inextricably intertwined with the right to a fair trial

and right to the unhampered production of witnesses in one's defense that is at the very core of the Fifth and Sixth Amendment guarantees. This Court recently reaffirmed this primal constitutional value in *United States v. Nixon*, 418 U.S. 683, 711 (1974):

> The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted by the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the court to vindicate those guarantees and to accomplish that it is essential that all relevant and admissible evidence be produced.

Indeed, so important is the petitioner's constitutional right to freely call witnesses so that live testimony may be presented on his behalf, that the Court has stated:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense.

Chambers v. Mississippi, 410 U.S. 284 (1973), citing *Webb v. Texas*, 409 U.S. 95, 98 (1972); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *In re Oliver*, 333 U.S. 257 (1948).[17]

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[17]As explained by the Court in *Washington v. Texas* (388 U.S. at 19):

> The right to offer the testimony of witnesses and to compel their attendance if necessary is in plain terms the right to present a defense, the right to present the defend-

(This footnote is continued on next page)

If a witness's rights can be trampled upon with impunity, as they were here, the ability of a defendant to obtain witnesses on his behalf will be necessarily and seriously impaired, particularly in a case such as this where the witnesses' testimony is important to the defendant and where the witnesses have the option to testify or to continue to assert their Fifth Amendment right to remain silent. In such situations, the power to subpoena witnesses is not sufficient to ensure the defendant's ability to present his case. A defendant is utterly dependent upon the witnesses' *co-operation* in agreeing to testify. Thus, it has been consistently held that the government may not impair, directly or indirectly, the willingness of potential witnesses to freely testify on behalf of the defense. See *United States v. Thomas*, 488 F.2d 334, 336 (6th Cir. 1973) (government agent's threat of prosecution "interfered with any free and unhampered determination the witness might have made as to whether to testify and if so, as to the content of such testimony" and thus required a new trial); *United States v. Morrison*, 535 F.2d 223, 228 (3rd Cir. 1976) (prosecutor's intimidation in an unnecessary interview "interfered with the voluntariness of the [witnesses'] choice [whether or not to testify] and infringed defendant's constitutional right to have [witnesses'] freely given testimony"); *Bray v. Paton*, 429 F.2d 500, 501 (4th Cir. 1970) (state's arrest and intimidation of defense witness requires a new trial); *United States v. Smith*, 478

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ant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish the defense. This right is a fundamental element of due process of law.

F.2d 976 (D.C. Cir. 1973) (prosecutor violated Fifth Amendment by warning witness that he might be incriminating himself; such warning is calculated to intimidate witness from testifying).

Plaintly, witnesses who are aware that their invocation of the Fifth Amendment before the grand jury will be publicly revealed and used to discredit them will be reluctant or unwilling to voluntarily take the witness stand: why should such witnesses stand and expose themselves to the public ignominy and threat to their own livelihood which revelation of their conduct before the grand jury would surely entail? For these reasons, the court below seriously erred in analyzing the constitutional problems solely in terms of the witnesses' right to remain silent. Violation of the witnesses' right to claim the privilege in secrecy here leads inevitably to a violation of the petitioner's own constitutional right—his right to call witnesses on his own behalf who are not discouraged from testifying by fear of government action which may cause them to be publicly discredited and professionally disgraced.

The federal courts cannot shirk from the constitutional condemnation of a practice which so invidiously infringes upon a basic right.

The Court Erred in Denying Standing to Petitioner Who Is Asserting His Own Constitutional Right as Well as Those of His Witnesses.

In order to fully protect constitutional rights, the petitioner must be allowed to assert his witnesses' rights under the circumstances of this case. We commence with the proposition that the impeached witnesses suffered infringement of their constitutional rights. Use of a witness's prior claim of his Fifth Amendment

privilege against self-incrimination to discredit his subsequent testimony is surely an error with "grave constitutional overtones." *Grunewald v. United States,* 353 U.S. 391, 423 (1957) (invalidating such practice on non-constitutional grounds); indeed, as Justice Black stated, concurring in an opinion in which four Justices joined:

> "I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if the person can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution, to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution." 353 U.S. at 426.

While the panel below did not directly deal with the constitutional violation suffered by the witnesses here, it is noted that use of the witnesses' constitutionally protected prior silence would also violate the constitutional principle enunciated in *Doyle v. Ohio, supra,* —that it would be "fundamentally unfair and a deprivation of due process" to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial, 426 U.S. at 618. The court concluded (559 F.2d at 984; App. A):

> "That same unfairness may be present whenever the government attempts to exploit a proper invocation of the privilege. The factors found intolerable in *Doyle* might be thought to extend to the witnesses' silence in the face of grand jury questioning."

That the "factors found intolerable in *Doyle*" do indeed extend to a witness's silence before the grand jury, is clear from a review of the principles and precedents governing Fifth Amendment analysis.

Witnesses testifying before a grand jury are not only entitled but are *encouraged* to rely on the secrecy of those proceedings. See, *e.g., Branzburg v. Hayes,* 408 U.S. 665 (1972). Plainly, the witnesses here, Wells and Gordon, were entitled to the reasonable expectation that their invocation of the Fifth Amendment before the grand jury would remain secret—indeed, that it could not be made public even if they, themselves, were indicted and took the stand in defense. *Grunewald v. United States,* 353 U.S. 391 (1957). Had these witnesses, at the time of their grand jury appearances, been forewarned that their exercise of the right to remain silent would be used against them—not for any compelling governmental purpose, nor for any probative evidentiary value,[18] but merely for the purpose of impugning their credibility and damaging their reputations — surely, their right to assert the privilege would have been rendered "costly." See *Spevack v. Klein,* 385 U.S. 511, 515 (1967).

This Court has repeatedly held that the state may not unnecessarily exact a price for assertion of the "grand privilege,"[19]; the prohibited costs have never been restricted to criminal sanctions. In *Spevack v. Klein,* 385 U.S. at 515, the Court noted that:

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[18]The Panel below explicitly found the disclosure of the witnesses' silence has "no proper significance as impeachment evidence." (559 F.2d at 983).

[19]See, *e.g., Malloy v. Hogan,* 378 U.S. 1 (1964); *Griffin v. State of California,* 380 U.S. 609 (1965).

> In [the Fifth Amendment] context, "penalty" is not restricted to fine or imprisonment. It means as said in *Griffin v. State of California*, 380 U.S. 609 . . . the imposition of any sanctions which makes assertion of the Fifth Amendment privilege "costly."

Within the context of that case, the Court held that:

> The threat of disbarment and the loss of professional standing, professional reputation and of livelihood, are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him." (*Id.*). [Emphasis added].[20]

Nor is the threat of discharge the only "cost" which can unduly burden the exercise of the Fifth Amendment privilege. In *Lefkowitz v. Turley*, 414 U.S. 70 (1973), the sanction of disqualification from state contracts was held impermissible. In *McCarthy v. Arndstein*, 266 U.S. 34 (1924), the state's valid interest in marshalling and distributing the assets of bankrupts was held not to prevail over the protection of the privilege.

The constitutional justification for refusing to permit the government to unnecessarily make "costly" the exercise of the Fifth Amendment right, has been framed in a variety of terms. *Doyle v. Ohio, supra*, found

[20]See also *Slochower v. Board of Education*, 350 U.S. 551 (1956); *Garrity v. State of New Jersey*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); and *Uniform Sanitation Men v. New York*, 392 U.S. 280 (1968) (state may not burden the Fifth Amendment right by threat of loss of employment).

it "fundamentally" unfair and a "deprivation of due process" to extend with one hand the privilege of silence, while placing, with the other hand, a price upon that silence (*id.* at 618). *Miranda v. Arizona*, 384 U.S. 436 (1966) indicated that the Fifth Amendment demarcated the "right to a private enclave where [one] may lead a private life" (*id.* at 460) (quoting *United States v. Grunewald*, 233 F.2d 556, 581 (Frank, J. dissenting, reversed 353 U.S. 391 (1957)).[21]

Whatever terms are used, however, it is clear that threats that the government will publicly advertise a witness's invocation of the Fifth Amendment privilege—and thus damage his credibility and reputation—works a compulsion against and exacts a heavy penalty for the assertion of that privilege. In the words of *Doyle*, it is "fundamentally unfair" to assure witnesses before the grand jury that they may avail themselves of the Fifth Amendment protection in secret and then to gratuitously publicize that assertion at an open trial. In the language of *Miranda* and *Griswold*, these witnesses had a justifiable and constitutionally protected expectation that the government would refrain from needlessly invading the domain of privacy which they demarcated before the grand jury.

Indeed, just as occurred in *Spevack, supra*, Wells and Gordon have been forced to suffer "loss of professional standing [and] professional reputation" and they

[21]See also *Boyd v. United States, supra*, 116 U.S. at 630; *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964); *Griswold v. Connecticut*, 381 U.S. 479 (1965) noted that "The Fifth Amendment in its self-incrimination clause enables the citizen to create his own privacy which government may not force him to surrender to his detriment." (*id.* at 484).

face the very real possibility that their jobs as union officials will be endangered.[22]

No justification for imposing this burden on the exercise of constitutional rights exists; indeed, the penalty was here exacted in a procedure which the court below found impermissible even from an evidentiary viewpoint.

The Petitioner Has Standing to Raise the Witness's Constitutional Rights in This Case.

Here, despite the plain infringement upon the witnesses' constitutional rights, the court of appeals held that no constitutional issue could be raised in this case. The court justified this conclusion by reference to the general and oft-repeated "rule" that one person may not object to the violation of another person's rights. This "rule" however, is one which as many commentators have noted, is riddled with exceptions. See, Note, "Standing To Assert Constitutional Jus Tertii," 88 Harvard Law Review 423, 425 (1968); Settler, "Standing to Assert Constitutional Jus Tertii In the Supreme Court," 71 Yale Law Journal 599 (1962); Scott, "Standing in the Supreme Court—A Functional Analysis," 86 Harvard Law Review 645 (1973) and Louis, "Constitutional Rights and the Misuse of Standing," 14 Stanford Law Review 433 (1962).

Indeed, the principle that one has no standing to vindicate another's constitutional right is "only a rule of practice." *Barrows v. Jackson*, 346 U.S. 249, 257

[22]Although it appears that this Court itself has never resolved this issue, lower courts have held that there is no constitutional right to employment and private employers may therefore discharge employees for exercising Fifth Amendment rights. See, *e.g., Cary v. Westinghouse Electric Corporation*, 178 N.Y. 2d 846, affirmed, 190 N.Y. 2d 1103 (1958).

(1953) which "like any general rule should not be applied when its underlying justifications are absent." *Singleton v. Wolf*, 428 U.S. 106, 114 (1976).

In *Singleton*, the court reviewed the factors which justify or may even make imperative the court's permitting a litigant to raise another's rights. First, there must be a concrete injury to the litigant sufficient to create a "Case or Controversy" within the meaning of Article III. Second, the court must analyze whether "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue" so that the court "can be sure that construction of the right is not unnecessary in the sense that the rights enjoyment will be unaffected by the outcome of the suit." 428 U.S. at 115.

Third, the court must consider whether the relationship between the litigant and the person whose rights are asserted makes the litigant "fully or very nearly as effective a proponent of the right as the latter" (*ibid.*). Finally, the court must look to the ability of the third party to assert his own rights. If there is "a genuine obstacle to such assertion . . . the party who is in court becomes, by default, the right and justifiable proponent" (*id.* at 116).

Applications of these principles to the instant case must result in finding that the petitioner here had standing to raise the constitutional infringement suffered by the witnesses Wells and Gordon. First, there is no question that the petitioner, threatened with loss of liberty through a criminal conviction, has a "case and controversy." Second, the witnesses' enjoyment of their Fifth Amendment right is, as fully discussed above, seriously "affected" if they can be discredited by being

forced to reveal, in violation of the guaranteed secrecy of grand jury proceedings, that they exercised their constitutional right against self-incrimination. In this respect, the witnesses' "enjoyment" of their right is, in fact, utterly dependent upon the outcome of this case. Third, considering the impact on the petitioner, it witnesses called on his behalf are successfully impeached by the government, the petitioner is surely as effective a proponent of the rights at issue here as the witnesses themselves could be. Fourth, and most importantly, unless the petitioner here is permitted to raise the witnesses' constitutional rights in this case, there is, in fact, absolutely no way the witnesses themselves can vindicate those rights. The instant case is stronger in this respect than *Singleton* where the third parties (women seeking abortions) could themselves, albeit with difficulty, bring suit to assert their own rights. Here, no ameliorative suit is possible; indeed, in the recent case of *Imbler v. Pachtman*, 424 U.S. 409 (1976), this Court squarely held that the prosecutor is absolutely immune from civil suit for acts such as those at issue here, taken by him in the course of pursuing a criminal prosecution and in presenting the government's case at trial. Consequently, under *Singleton*, the defendant here is literally "by default, the right's best—if not only available proponent."[23]

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[23]The petitioner here thus not only satisfies the requirements of the plurality opinion in *Singleton*, but also meets the more stringent test the concurrent dissent would require. In his concurring opinion, Justice Stevens indicated that to have standing it was probably also necessary that the litigant raising another's constitutional right have his own constitutional claim as well. As will be discussed below, the petitioner here does indeed have his own constitutional claim. Moreover, the dissenters in *Singleton* stated that third party standing should be barred except where it was otherwise virtually impossible for the third party to vindicate his right—as it would be here.

Further, the total lack of civil remedy available to the witnesses in this case distinguish this case from those in which standing has been denied to defendants who seek to raise the Fourth Amendment rights of persons other than themselves. A non-defendant victim of an illegal search and seizure, while without the defendant's remedy of suppression of tainted evidence, may nevertheless vindicate his own Fourth Amendment rights through the vehicle of his suit for damages (see, *e.g.*, *Bivens v. Six Unknown Federal Agents*, 403 U.S. 388 (1971)) or by the implication of criminal penalties for unlawful surveillance. Indeed, in denying standing to a defendant to object to evidence obtained in violation of another's Fourth Amendment rights, the Court has pointed to the availability of criminal penalties to vindicate the victim's rights. *Alderman v. United States*, 394 U.S. 165, 175 (1969). An additional distinguishing factor is that "no rights of the victim of an illegal search are at stake when evidence is offered against another party." *Alderman v. United States, supra*, at 174; in the instant case, of course, the witnesses' rights were directly violated by impeaching them in trial as the court of appeals, at least implicitly, recognized. Finally, as the Court pointed out in *Jones v. United States*, 362 U.S. 257, 261 (1960), evidence from an illegal search is not "inherently unreliable or prejudicial," but violation of the constitutional rights at issue here does, in fact, result in precisely such inherently unreliable and highly prejudicial effects—specifically, the improper inference of guilt from the mere exercise of the right to remain silent.

Nor is this case controlled by the cases holding that the petitioner may not object if the witness is

incorrectly ordered to answer a question despite a valid Fifth Amendment claim and the witness then incriminates himself along with the petitioner, *e.g.*, *Bowman v. United States*, 350 F.2d 913, 916 (9th Cir. 1965). In such a situation, the witness at least will be able to exclude his improperly obtained testimony in any subsequent prosecution that might follow, but the witnesses in this case who did *not* incriminate themselves by remaining silent will under no circumstances have any remedy. If the petitioner in this case cannot assert the rights of his witnesses, then those rights will simply be forfeited.

The Court of Appeals Misapprehended the Prejudice Suffered by Petitioner.

As we have demonstrated above, the court of appeals should properly have applied the stricter test applicable to constitutional error. Nevertheless, irrespective of the test applied, the circumstances present here demonstrate sufficient prejudice to require the action of this Court to reverse the judgment of conviction.

The careful distinction drawn by the court of appeals as to the applicability of the *Kotteakos* standard indicates the court's grave concern as to whether the error could have infected the jury's verdict. Moreover, the approach adopted by the court strongly suggests the court's unwillingness to conclude that the error was harmless beyond a reasonable doubt. In our view, a determination that the error was harmless is clearly erroneous irrespective of the standard employed. The court's rationalization that the Gordon-Wells testimony is cumulative to the testimony of other defense witnesses is highly disingenuous. This Court has recognized that a reviewing court is not required to cast a stoic eye

upon the proceedings, but rather, may use common sense in appraising the actual issues raised by the proceedings. *Ashe v. Swenson*, 397 U.S. 436 (1970). In the instant case, the jury would assuredly not have credited the defense by quantitatively counting petitioner's corroborative witnesses. Here, the prosecutor sabotaged *the entire line of defense* by vigorously arguing that two of the defense's crucial witnesses were *fabricating* their testimony. If the jury accepted the prosecutor's argument, it defies logical analysis to conclude that they would not assume that the other corroborative witnesses were similarly part of the fabricated defense.[24] *A fortiori*, the prejudice where the prosecutor has argued that all the union-employed defense witnesses were "cronies" of petitioner, who "was the goose that laid the golden egg.'" A careful reading of the prosecutor's argument points up the utter unfairness of the situation which he created by his improper conduct. There was simply no way that petitioner could fairly defend the prosecutor's allegations that the witnesses had fabricated their story. It defies common experience to suggest that the jury would not have been misled by this nonprobative yet highly prejudicial argument.

The fundamental unfairness here flows not only to Wells and Gordon, who suffer the public ignominy, loss of reputation and perhaps livelihood by having their earlier invocations of the privilege exposed at

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[24]Thus, in a bank robbery case, if five defense witnesses provide a consistent alibi defense, yet because of improper impeachment of two witnesses the jury concludes that those two witnesses were perjuring themselves, it is incredible to suggest that the assessment of the credibility of those witnesses does not "spillover" and infect the jury's deliberative processes and evaluation of the credibility of the other witnesses who similarly supported the theory of the defense.

this public trial. The primary impact of the unfairness and prejudice is suffered by petitioner—as the prosecutor fully intended. Patently, the purpose of the cross-examination and argument was to destroy petitioner's defense. The totally improper criteria adopted by the prosecutor deprived the petitioner of the opportunity to have the jury evaluate his good faith unaffected by the improper suggestion that the jury could reject the defense because petitioner and his "cronies" fabricated the defense as evidenced by the witnesses' prior refusal to exculpate petitioner at the grand jury.

It does little credit to our courts as symbols of justice to comb the entire record to suggest that the jury may have discredited the witnesses for other reasons. In this case, because of the sanction of the trial court, the prosecutor's strongest argument impugning the witnesses' credibility was the argument which this court must now condemn. Assuredly, the jury could not be presumed to have ignored the prosecutor's argument in assessing the credibility of these two important witnesses. It is similarly illogical to assume that the jury could have credited *any* other corroborative witnesses after accepting the prosecutor's argument that Wells and Gordon had fabricated their testimony on petitioner's behalf subsequent to their grand jury appearances.

Moreover, our argument of prejudice is even stronger now that the court below recognized that important state of mind evidence was improperly excluded. As we argue *infra*, the "spillover" prejudice caused by the exclusion of this relevant testimony, plainly elevates the prejudice on the duplicate billing counts.

Petitioner's Entire Conviction Should Be Reversed Due to the Improper Exclusion of Highly Probative State of Mind Evidence.

Upon remand by this court (99 S.Ct. 67, 1978), the court below determined that the trial court had improperly prohibited the admission of exculpatory testimony proffered by petitioner. Concluding that the excluded testimony "would have significantly helped establish [petitioner's] defense" the Panel reversed the two counts of the conviction which represented the vast proportion of the monies allegedly embezzled, 591 F.2d 278, 283.[25] Nevertheless, without explicating its reasoning, the court affirmed the remaining counts without focusing on whether the admission at trial of the wrongfully excluded testimony could have affected the jury's evaluation of petitioner's intent on the remaining counts—for which criminal intent was a necessary requisite.

In our view, the court could not have properly concluded with requisite certainty that the excluded testimony only would have affected the jury's consideration on Counts 87 and 88, the salary increase counts.

Petitioner was charged with specific intent crimes. He adamantly defended each charge by contending that he lacked criminal intent. Thus, he defended the duplicate billing and income tax counts by contending that his intent was union-oriented and he did not divert the funds to his personal use. Despite the fact that these counts formed the vast numerical majority of the counts contained in the indictment, and the vast majority of the documentary evidence, nevertheless,

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[25]Specifically, of the $384,331 allegedly embezzled, $329,031 was contained in the two counts upon which the Court reversed the convictions.

the two now reversed counts contained the vast proportion of the monies allegedly embezzled and indeed, much of the testimony at trial was devoted to the salary increase counts. At trial, the government vigorously contended that petitioner's evil intent could be gleaned from the allegedly unlawful manner by which he raised his salary. The prosecutor made no effort to segregate the intent element among specific counts. Thus, the prosecutor commenced his argument (R.T. 1871-1872)]:

> Now, what we have to construct for you in this case, basically, is the intent of the man at the time he did the acts he is charged with doing. That does not mean the intent of the man as he sat on the witness stand and testified in this trial. That means the intent of the man as he did the acts that the Government has charged he did.
>
> There are certain ways to do that, and among those ways is for the jury to pick out items of intent in the exhibits and in the testimony that you have heard and seen.
>
> First of all, I think we should discuss the money that we have been talking about, the hundreds of thousands of dollars of money that we have been talking about in this case, and I think you should decide for yourselves whose money is that. That is the money of every member of these labor unions. That is their money. The money in the unions is theirs. The money in the trust fund is theirs. The money is not Mr. Rubin's money. It is the money of every member who ever contributed his dues, his assessments, his initiation fee. That is whose money it is.

The prosecutor devoted a significant portion of his closing argument to the salary increase counts. The prosecutor vigorously argued that petitioner flagrantly acted in his own self interest, contrary to the law. For example:

[R.T. 1876-1877]

> Well, what gives him the right not to take the oath of the constitution as every other union leader does?
>
> Of course, he says that his locals are different. Local 666 is different. So he takes it upon himself to interpret the constitution, the union constitution, to fit his local unions.
>
> Of course, he also told you that he interpreted the federal statutes differently that required members of the union to receive a notice when they would vote in an election.
>
> *Who is he to interpret the federal laws and interpret the constitution for his own benefit?*
>
> * * *
>
> Now getting back to the salary, you can see for yourselves. You can see the articles of the constitution and what they say about disbursing money and receiving a salary. There is no question about it. It is in there in black and white. It was read on the stand. It is there in black and white.
>
> * * *
>
> [R.T. 1879]
>
> The members have a right to vote. This is their money. *Mr. Rubin and his cronies, who make a fortune off the sweat of these laborers,* they cannot exculpate him.
>
> * * *

Now, if you will think about this and analyze it to a bank president—that is another person who holds money in trust for people who put money into a bank, similar to Mr. Rubin—the money is not his. He is holding that money in trust.

You will hear the Judge's instructions. He is a fiduciary. He holds the money in trust for other people. It is not his money.

Now, can you imagine a president of a bank increasing his salary seven times over a four-year period without any authorization from anyone? Inconceivable. That is not his money either, and I do not care whether he built that bank or not. That is not his money in there. He might have built the bank, but it is not his money.

* * *

The Government put on the International Representative from the International Union. He told you some interesting things. The constitution, the union constitution, governs these unions, 478, 666 and the District Council, and the International Constitution is the only thing they go by. They cannot go by their own rules and regulations.

Moreover, in his argument, as described *supra* and below, the prosecutor intermeshed the intent requirement for the salary increase counts with the other counts (R.T. 1949-1950):

He said that he felt he was only powerful when he flashed a roll of money. If he used this money for anything, anything to do with the unions at all, he used it to build his own personal power. That is what he used it for.

You know the old saying, "Power corrupts, and absolute power corrupts absolutely," and when he got absolute power, he was corrupted.

He thought, when he got this money, "Those are my unions, my money. I will use it any way I want to."

You heard him testify. That is not the law. That is not the facts. He even wanted to shift the blame to the labor-union members.

"Why did they not ask me? No one asked me. No one questioned me."

Now, I ask you, is a member of these labor unions, a common laborer, going to come up to Bernard Rubin, the most powerful labor leader in Florida, and say, "Mr. Rubin, have you raised your salary this year? How many times, sir? Can I vote on it? Mr. Rubin, are you double-billing my union? Mr. Rubin, are you writing checks out to yourself without keeping any record?"

Similarly, the jury instructions were constructed in a manner that would necessarily "spill over" to prejudice fair and discrete consideration once the jury had concluded that petitioner was guilty on the salary increase counts. Thus, on the salary increase counts the jury was instructed *inter alia*:

[R.T. 2071-2073]

The members of a labor organization are the real owners of the money and property of such organizations and are entitled to a full accounting of all transactions involving such money and property. Because union funds belong to the members, they should be expended only in the further-

ance of their common interest. A union treasury should not be managed as though it were a private property of the union officers, however well-intentioned such officers may be, but as a fund governed by fiduciary standards.

Section 501 of Title 29 does not prohibit any union officer or employee from receiving a bona fide expense account or bona fide salary in the furtherance of union interests. What is prohibited is the charging on union books of false and fictitious items of expense under the guise of expense accounts or the receipt of an unauthorized salary.

* * *

You should remember that a labor union operates under its own constitution, rules and by-laws which are enforceable in court.

Labor organizations are required by law to adopt and file constitutions and by-laws. This is required by Title 29, United States Code, Section 431. Moreover, Section 501 of Title 29 declares that officers of a union occupy positions of trust and have a duty to the union and its members to expend union money in accordance with the union constitution and by-laws.

Under the terms of this section, Section 501, of the United States Code Title 29, the defendant, Bernard G. Rubin, had a separate fiduciary duty to each labor organization of which he was either an officer or an employee. That duty, or position of trust, encompassed the responsibility of holding the moneys, funds and assets of each organization solely for the benefit of that organization and its members. Further, that position of trust included the duty to manage, invest and spend the moneys, funds and assets of each organization in accordance with its constitution and by-laws and any resolutions of the governing bodies adopted thereunder, and not for personal or even other union purposes. Any breach of this fiduciary duty, where the requisite unlawful intent is proved is a violation of Title 29, United States Code, Section 501(c).

In our view, under the circumstances present here, it is plainly impossible to conclude that the exclusion of critical evidence bearing upon petitioner's intent with respect to the salary increase counts could not have affected the jury's consideration and determination of guilt on the remaining counts. This case went to the jury in a posture that necessarily would have produced a verdict of guilt on the salary increase counts. Since the critical evidence bearing upon petitioner's state of mind was excluded, the jury necessarily would have found petitioner guilty. Having found that petitioner wrongfully and criminally raised his salary, it is simple to understand that the jury's evaluation of guilt on the salary increase counts would spill over to their consideration of the remaining counts.

The issue we posit here—the "spill over" prejudice caused by the exclusion of relevant testimony was considered by the Second Sircuit in *United States v. Barash*, 365 F.2d 395 (1966). In *Barash*, the Court concluded that the trial court had improperly limited impeachment evidence proffered by the defense relative to certain counts of the indictment. Despite the fact that the proffered impeachment did not relate to the remaining counts under attack, the remaining counts were nevertheless reversed because the Court "was far

from certain that the restriction" on the impeachment of the Chief Government witness "did not have a spill-over effect on [the remaining] counts" (365 F.2d at 403).

In *Barash*, however, unlike the instant case, the defendant was allowed to introduce part of the exculpatory evidence, and indeed even a portion in summation, before the trial court restricted the effort (*id.* at 401). The Court nevertheless reversed due to the non-cumulative and important nature of the impeachment material.

In the instant case, however, the same result should follow *a fortiori*. Here petitioner was completely deprived of the opportunity of presenting the exculpatory testimony. Moreover, the jury was provided with a prosecutorial argument and indeed jury instructions which were calculated to intermesh and "spill over" and thus could only produce a guilty verdict under the circumstances.

At this juncture, the proper standard of review is the test enunciated in *Kotteakos v. United States*, 328 U.S. 750 at 764-769 (1946):

> If, when all is said and done, *the conviction is sure* that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, *it is impossible to conclude that substantial rights were not affected*. The inquiry cannot be merely whether

> there was enough to support the result, apart from the phase affected by the error. It is rather, even so, *whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.*

See also *United States v. Shepherd*, 576 F.2d 719, at 723 (7th Cir. 1978), rhg. den. (1978), cert. den. 99 S.Ct. 158 (1978).

In our view, our argument is strengthened by the fact that on direct appeal of petitioner's convictions, the court of appeals accepted our view that the government had improperly impeached defense witnesses on the duplicate billing counts, the counts presently under attack.[26]

The extent of the prejudice which occurred as a result of the improper impeachment of these defense witnesses is plainly incalculable. It is now manifest that serious error affected both the salary increase counts and the duplicate billing counts (and accordingly, the remaining counts, all of which were dependent upon those two theories). The jury was improperly instructed and the prosecutor's argument was improper. It seems to us that under the circumstances there is "no guarantee" (Cf. *United States v. Brown*, 555 F.2d 407, cert. den. 435 U.S. 951; see also *Milanovich v. United States*, 365 U.S. 551 (1961)) that the jury would have reached the same result on any count if petitioner had been afforded a truly fair trial at which (1) he could have presented all relevant and important evidence of intent; (2) the jury was properly

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[26]The other counts, *i.e.*, the racketeering counts, tax evasion and failure to keep records counts necessarily must stand or fall directly in relation to the disposition of the duplicate billing counts.

instructed on each count, particularly as related to proper indicia of intent and (3) the prosecutor's summation did not include inflammatory, prejudicial and erroneous elements relying upon patently improper criteria to bring about a guilty verdict on each count.

We urge that in the context of the present reversal of the salary increase counts, it would be simply unfair to conclude that petitioner received a fair trial. The proper disposition is to reverse for a new trial on all counts to afford petitioner a fair trial at which petitioner will be able to fairly put his state of mind before a properly instructed jury, unhindered by improper impeachment and argument by the prosecutor.

II

THE DECISION BELOW SQUARELY CONFLICTS WITH THE DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WITH RESPECT TO FAILURE TO RECORD GRAND JURY PROCEEDINGS DESPITE TIMELY PREINDICTMENT REQUEST.

At the initial stages of the grand jury proceedings in this matter, petitioner filed a "MOTION TO RECORD ALL PROCEEDINGS BEFORE THE FEDERAL GRAND JURY" (R. 434-435).[27] As part of the motion, counsel, on behalf of petitioner, offered to pay "all added expenses necessitated by such recordation" (*ibid.*).

[27]Specifically, counsel requested the recordation of:

A. The entire testimony of all witnesses;

B. All remarks and comments of the prosecutors of any nature whatsoever; and

C. All instructions of law, general or special, given to said grand jury (R. 434).

In support of the motion to record, counsel pointed out that the record demonstrated that the prosecutor in the instant case was overzealous and that there was reason to justifiably fear prosecutorial misconduct.[28]

The district court denied the motion, without opinion (R. 450).

Subsequent to the Indictment, as part of the pretrial motions, petitioner moved to dismiss the Indictment for failure to record the grand jury proceedings, despite request (R. 333-344). This motion was also denied.

On appeal, petitioner contended that under the circumstances, the court improperly refused to require recordation. The court of appeals concluded that while "the far better practice is to record grand jury proceedings, including the comments of the prosecutor, . . . [n]evertheless there remains no constitutional or statutory requirement of recording." (559 F.2d at 988, App. A). While the court "[a]ssum[ed] a defendant's substantive right to dismiss an indictment based on prosecutorial misconduct so flagrant as to deny fundamental fairness", the court determined that it could not "regard [petitioner's] speculation as a sufficient demonstration of need to require reversal for the district court's failure to require recording, to order production of existing grand jury records, or to conduct a hearing inquiring into the prosecutor's action." (*Ibid.*).

The court of appeals thus digressed from the rule established by the United States Court of Appeals for

[28]Counsel relied upon pleadings filed in the district court, and an *ex parte* letter written by the prosecutor to a district judge accusing petitioner and his attorney (not present counsel) of obstruction of justice. That letter and present counsel's response are found at Appendix D and Appendix E, respectively.

the Ninth Circuit in *United States v. Thoresen,* 428 F.2d 654, 666 (1970) and *United States v. Price,* 474 F.2d 1223, 1225 (1973). In *Thoresen,* the court asserted that the proper time to request recordation was at the pre-indictment stage of the proceedings:

> [T]he fact that a particular discovery procedure is "permissive rather than mandatory" does not mean that permission may be arbitrarily denied. Where a defendant, anticipating future grand jury proceedings involving himself, gives notice in advance that he will seek a transcript of the proceedings if the indictment is returned and offers to pay the expenses of having a reporter in attendance or shows inability to pay, a sound exercise of discretion would ordinarily call for the granting of a motion that a reporter be in attendance.

In the later case of *United States v. King,* 478 F.2d 494, 507 (9th Cir. 1973), the court characterized the government's failure to record grand jury testimony as "arrogant" and cautioned (at 508):

> We repeat our previous warnings however; the Government is courting disaster when it fails to record grand jury proceedings and the judges should exercise their discretion to require such recording.

In *United States v. Price, supra,* the court established the rule now applicable in the Ninth Circuit.

> We adhere to the principles stated in *Thoresen,* and we now implement them by holding that the district court must exercise its discretion in passing upon a preindictment motion for recordation of grand jury proceedings and that a district court abuses its discretion in denying the motion of parties situated as were appellants, in absence of a Government showing that it has a legitimate and compelling interest to be served by non-recordation. The Government cannot meet its burden by resort to the secrecy rubric. Secrecy of grand jury proceedings is not jeopardized by recordation. The making of a record cannot be equated with disclosure of its contents, and disclosure is controlled by other means.

The court below refused to follow the lead of the Ninth Circuit. Thus, there exists a significant conflict which requires this Court's resolution.

Rule 6(d) of the Federal Rules of Criminal Procedure provides in pertinent part:

> "[A] stenographer or operator of a recording device may be present while the grand jury is in session . . ."

The developing law is now legion that it is better practice to record. *United States v. Peden,* 472 F.2d 483 (2d Cir. 1973); *United States v. John,* 408 F.2d 1134 (8th Cir. 1975); *United States v. Cianchetti,* 315 F.2d 584, 591 (2d Cir. 1963); *United States v. Cramer,* 447 F.2d 210, 214 (2d Cir. 1971); *United States v. Battisti,* 486 F.2d 961 (6th Cir. 1973); *Schlinksy v. United States,* 379 F.2d 735, 740 (1st Cir. 1967); *United States v. Aloisio,* 440 F.2d 705 (7th Cir. 1971).

From the standpoint of justice, there is simply no compelling reason not to require recordation of all the proceedings, including the prosecutor's comments. Where, as here, there is *prima facie* evidence of a zealous prosecutor, there can be no sound reason to

deny recordation. The strong policy underlying recordation was stated forcefully by the Honorable Judge Pettine of Rhode Island in *United States v. Gramolini*, 301 F.Supp. 31, 41-42 (D.C.R.I. 1969). See also *United States v. Battisti*, 486 F.2d 961 (6th Cir. 1973) (rejection of government challenge to a local district court rule requiring recordation).

Emerging from the present line of cases is the firm notion that there are no disadvantages in requiring recordation. Recordation can only serve to further the ends of justice.

Moreover, there is no reason to distinguish between recordation of testimony of witnesses and recordation of the comments of the prosecutor. *United States v. Messitte*, 324 F.Supp. 334 (S.D.N.Y. 1971); *United States v. Peden*, 472 F.2d 583, 584 (2d Cir. 1973). See ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function, §35(c) (Approved Draft); See also 8 Moore's *Federal Practice* at ¶6.02(2), p. 611 (Cipes Ed., 1969).

The court of appeals correctly assumed a defendant's substantive right to dismissal of an indictment where flagrant prosecutorial misconduct denied fundamental fairness. See *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974); *Wood v. Georgia*, 370 U.S. 374, 390 (1962); *United States v. Chanen*, 549 F.2d 1306 (9th Cir. 1977); *United States v. Gallo*, 394 F.Supp. 310 (D.Conn. 1975); *United States v. DeMarco*, 401 F.Supp. 505 (C.D. Cal. 1975). The court's conclusion that petitioner's contentions were "speculation" demonstrates the need for the prophylactic rule which we espouse and which is now the law in the Ninth Circuit. Since prosecutorial misconduct can rise to sufficient proportions to require dismissal of an indictment, it necessarily follows that recordation is essential to vindicate the right. If the prosecutor's comments are not recorded, as here, any suggestion of prejudice is necessarily speculative. Moreover, the court below engaged in circular reasoning in concluding that petitioner had not made a sufficient demonstration of prejudice to require production of the existing grand jury records or to require a hearing. Manifestly, by escaping recordation of his comments, the prosecutor renders any disclosure of the other recorded proceedings, or indeed, a hearing, entirely meaningless.

Fundamental fairness dictates that a prosecutor not be given free rein to inflame or prejudice a grand jury. It is beyond contradiction that a prosecutor holds a high place in the esteem of lay grand jurors and the chance of improper influence is high, even if based on good intentions. If a prosecutor knows that his comments are on the record and subject to review, the only possible effect would be to further the interests of justice.

In our view, the court below seriously erred in not requiring recordation, where there was colorable overzealousness and a timely preindictment request. This Court's review is thus necessary to establish a rule of uniform application on this matter of extreme importance to the administration of justice.

Conclusion.

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

RICHARD L. ROSENFIELD,
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FLAX AND ROSENFIELD,
Of Counsel.

APPENDIX A.

UNITED STATES of America, Plaintiff-Appellee, v. Bernard G. RUBIN, Defendant-Appellant. No. 76-1143.

United States Court of Appeals, Fifth Circuit.

Sept. 22, 1977.

Appeal from the United States District Court for the Southern District of Florida.

Before GOLDBERG and HILL, Circuit Judges and KERR,* District Judge.

GOLDBERG, Circuit Judge:

Bernard G. Rubin appeals from his conviction of charges relating to his role in the financial operations of several southern Florida laborers' organizations. Appellant is a Special International Representative of the Laborers' International Union of North America. He is President of the Southwest Florida Laborers' District Council (hereinafter "District Council"), an umbrella organization supervising several locals. He is President of the Concrete Products & Material Yard Workers Local #666, Business Manager of Local #478, and a trustee of several labor trust funds.

Following a two week trial a jury found appellant guilty of 103 counts of the 105 count indictment charging embezzlement of union and employee welfare benefit plan funds, 29 U.S.C. § 501(c), 18 U.S.C. § 644; racketeering, 18 U.S.C. § 1962(c); false statements on income tax returns, 26 U.S.C. § 7206(1); and failure to keep labor union records, 29 U.S.C. §§ 436, 439. The court imposed concurrent sentences

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*Senior District Judge of the District of Wyoming, sitting by designation.

on all counts up to a maximum of five years imprisonment. The court levied fines totalling $50,000.00 on five different counts. Finally, the court ordered appellant to forfeit all his union and trust fund positions as well as his right to seek such positions in the future.

Eighty-six counts of the indictment charged appellant with embezzling funds from the various unions and trust funds by submitting to those entities duplicate expense vouchers, mostly for travel and entertainment, thereby receiving multiple reimbursements for expenses incurred. With respect to each expense covered by the indictment, appellant had sent a voucher to each of two or more of the organizations and received reimbursement. The government credited one reimbursement of each expense as legitimate, charging embezzlement only on the duplications. Appellant did not deny the fact of these many multiple reimbursements. Rather, he maintained that he employed the duplicate billing system to create a cash fund he needed for additional union related expenses. Rubin asserted that he had understood his power of the purse in the various organizations to encompass accumulating such a fund and making such expenditures. Numerous defense witnesses testified that he had spent large amounts of cash in past organizing drives and in entertaining management.

Additionally, the indictment charged appellant with two counts of embezzlement through granting himself over $300,000 in unauthorized salary increases as an officer of local 666 and the District Council. The charges of inadequate recordkeeping largely related to required documentation of union treasury disbursements. The tax counts charged false subscribing of

income tax returns, in that appellant received substantial income in excess of the amount reported. Finally, on the basis of the embezzlement allegations appellant was charged with conducting or participating in the conduct of the union organizations through a pattern of racketeering activity.

On appeal Rubin proffers several claims of error. We agree with appellant's contention that two of his defense witnesses should not have been cross-examined regarding their prior refusals to testify before a grand jury, but we find the error harmless in the circumstances. We reject appellant's remaining claims of error in the conviction. Finally, though we think the district court properly ordered Rubin to forfeit the positions he presently holds, we must reverse its order that he forfeit his right to seek such offices in the future.

I. Defense Witnesses' Silence Before the Grand Jury.

Appellant's most troubling challenge to the validity of the conviction relates to the government's attempt to impeach two defense witnesses by eliciting on cross-examination their prior refusals to testify before a grand jury. We conclude that the trial court violated evidentiary canons by permitting such impeachment.

In light of the cumulative nature of the witnesses' testimony, the substantial proper impeachment of these and all other defense witnesses, and the inherent implausibility of appellant's defense theory, however, we cannot conclude that the error here requires reversal.

Kenton Wells, an organizer for the District Council, and Jack Gordon, an organizer for the District Council and local 666, were two of eight witnesses who corroborated appellant's story that during the relevant years he had handed out large amounts of cash to subordi-

nates for use in organizing campaigns and had spent large amounts of cash entertaining management figures. Appellant testified these expenditures required a large cash fund which he maintained through the multiple billing of the various union entities for yet other expenses. Rubin claimed he had understood that accumulating funds in this manner and disbursing them for general organizing purposes fell within the authority granted him by the District Council and local 666. The defense witnesses, Wells and Gordon among them, corroborated only the fact of numerous disbursements for organizing and entertaining. They gave no testimony regarding the source of Rubin's funds.

In an effort to impeach the testimony of Wells and Gordon through proof of a prior inconsistent act, the prosecution brought out on cross-examination the witnesses' previous refusals to testify before the federal grand jury investigating the activities of southern Florida laborers' organizations. Of Wells the government inquired as follows:

Q. Without respect to the exact date, sir, did you appear twice before the Federal Grand Jury?

A. Yes, sir.

Q. Were you asked questions concerning your labor-union activities and Mr. Rubin?

A. Yes, sir.

Q. Did you refuse to testify on both of those occasions?

A. Yes, sir, I did. (T. 1522-23).

At one time during the colloquy, set out in its entirety in the margin,[1] Wells volunteered that he "had taken

[1]Q. Mr. Wells, I notice that Mr. Flax asked you your occupation.
A. Yes, sir.

the Fifth Amendment." (T. 1521). Similarly, the following exchange took place during the cross-examination of Jack Gordon:

Q. Mr. Gordon, did you appear at the Federal Grand Jury on May 27, 1975?

Q. Mr. Gordon, did you appear at the Federal Grand Jury on May 27, 1975?

A. I don't remember the date. I appeared there, yes, at the grand jury.

Q. Did you ever refuse to testify?

A. Yes, I did. (T. 1622-23).

Q. Have you ever given a different response on a previous occasion?
A. Not that I know of as far as my occupation. No, I don't.
Q. Do you remember testifying to a Federal Grand Jury on April 29, 1975?
MR. ROSENFIELD: Can I have a copy of that, Counsel?
MR. STEINBERG: I don't have extra copies, Mr. Rosenfield.
A. Yes, I do, 1975.
MR. ROSENFIELD: Before he inquires, I would like an opportunity to take a look at the document.
MR. STEINBERG: It's not part of discovery, Your Honor. I only have one copy. It's not discovery.
THE COURT: Let him look over your shoulder or read what you are reading.
MR. ROSENFIELD: That is fine.
I object to the characterization as not being discoverable. It is now discoverable.
BY MR. STEINBERG:
Q. Did you ever give a different response on a previous occasion, Mr. Wells?
A. Not that I know of, sir.
Q. Did you testify in the Federal Grand Jury on April 29, 1975, sir?
A. This year?
Q. That's correct.
A. No, sir, I didn't.
Q. You did not?
A. I came before the Federal Grand Jury.
Q. Were you asked this question:
"Q. What is your occupation?"

(This footnote is continued on next page)

The trial court overruled defense counsel's objections to both these lines of inquiry. As part of his discussion of the defendant's case during closing argument, the prosecutor commented on the testimony of Wells and Gordon, plainly stating that he saw a contradiction between their corroboration of appellant's exculpatory story and their refusals to speak to the grand jury.

A. Improper Impeachment Under Evidentiary Guidelines

Appellant asserts that admission of the witnesses' silence before the grand jury, exacerbated by the prosecutor's reference during argument, was error. We agree

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A. I was asked that question.
Q. Did you give the same response that you gave to Mr. Flax?
A. I gave my address at that time, sir, 836 West Drive.
Q. After you gave your address, were you asked your occupation?
A. Yes.
Q. Did you give the same response that you gave Mr. Flax?
A. No, sir. I took the Fifth Amendment.
MR. FLAX: May we approach the bench, Your Honor?
THE COURT: Come right up.
(Side-bar conference:)
MR. ROSENFIELD: Your Honor, I would suggest that because the man answered the question before the grand jury that he refused to answer on the ground that it might tend to incriminate him, this would be improper and highly prejudicial. There is nothing inconsistent about a witness' trying to invoke the Fifth Amendment in front of a grand jury and testifying here. There is nothing inconsistent about that at all. This kind of questioning is improper.
I would suggest that before counsel be allowed to interrogate him with respect to that document, that I be allowed to take a look at it.
THE COURT: I have overruled your objection. You can certainly bring out that he refused to testify before the grand jury. I think that is proper cross-examination.
I do not think we need fifty questions to do it. If he refused to answer all the questions, I think we can bring that out and then drop it.

that under well-established evidentiary principles the impeachment was improper.

1. *The Requirement of Inconsistency Between Silence and Testimony*

[1, 2] In *United States v .Hale,* 422 U.S. 171, 95 S.Ct. 2133, 2136, 45 L.Ed.2d 99 (1975), the Supreme Court reiterated the governing principles:

> A basic rule of evidence provides that prior inconsistent statements may be used to impeach

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MR. STEINBERG: Fine.
(Side-bar conference concluded.)
BY MR. STEINBERG:
Q. Mr. Wells, were you called to testify before the Federal Grand Jury on two occasions, October 29, 1974, and April 29, 1975?
A. Sir, I could not possibly swear to that because I don't have anything at all to tell me what time I went up there. You could ask me a question of that nature and I can't tell you exactly what date or when those specifics took place.
Q. Without respect to the exact date, sir, did you appear twice before the Federal Grand Jury?
A. Yes, sir.
Q. Were you asked questions concerning your labor-union activities and Mr. Rubin?
A. Yes, sir.
Q. Did you refuse to testify on both of those occasions?
A. Yes, sir, I did.
Q. Mr. Wells, during any of those occasions did you tell the grand jury or the Government about this fund of cash that you were receiving?
MR. ROSENFIELD: I will object to that, Your Honor. He testified he has not testified before. Any other question he would be incompetent to answer. He said he did not testify.
THE COURT: I think this question has two parts and I will sustain the objection. I think he has answered that part dealing with the grand jury. I am not so sure he answered the part dealing with the Government, if that means someone other than the grand jury.
THE WITNESS: Would you repeat the question, sir.
BY MR. STEINBERG:
Q. Mr. Wells, I will rephrase the question.
Have you ever told the Government before about this cash that you were receiving from Mr. Rubin to organize?
A. I don't recall telling the Government anything, sir. (T. 1519-24).

> the credibility of a witness. As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent. 3A J. Wigmore, Evidence § 1040 (Chadbourne rev. 1970). If the Government fails to establish a threshold inconsistency between silence . . . and later exculpatory testimony at trial, proof of silence lacks any significant probative value and must therefore be excluded.

See also Grunewald v. United States, 353 U.S. 391, 418-19, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957). In *Hale,* the Court concluded that a defendant's silence in the circumstances following arrest and *Miranda* warnings lacked the requisite inconsistency with his exculpatory trial testimony and that such silence was therefore inadmissible for impeachment purposes. More recently the Court has held that the impeachment use of a defendant's post-arrest, post-*Miranda* warning silence violated the due process clause. *See Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

For present purposes we limit our analysis to the evidentiary framework employed in *Hale.* Into that framework we must place, not a defendant, but a defense witness and, not the circumstances of a post-arrest police interrogation, but those of the grand jury room. The question before us is whether the prior silence of a defense witness before the grand jury conveys the threshold inconsistency with the witness's exculpatory trial testimony that is necessary to permit the use of the silence to impeach the testimony. We hold that it does not.

2. *Silence and the Grand Jury*

Grunewald v. United States, supra, precludes any suggestion that silence before the grand jury is more probative than silence following arrest. In the circumstances of *Grunewald,* the Supreme Court squarely rejected the argument that the defendant's invocation of the pivilege against self-incrimination before the grand jury had "involved such inconsistency with any of his trial testimony as to permit its use against him for impeachment purposes." 353 U.S. at 419, 77 S.Ct. at 981.

To reach that conclusion the Court placed significant reliance on factors always attendant upon appearing before a grand jury:

> [T]he Fifth Amendment claim was made before a grand jury where [defendant] was a compelled, and not a voluntary, witness; where he was not represented by counsel; where he could summon no witness; and where he had no opportunity to cross-examine witnesses testifying against him. These factors are crucial in weighing whether a plea of the privilege is inconsistent with later exculpatory testimony on the same questions, for the nature of the tribunal which subjects the witness to questioning bears heavily on what inferences can be drawn from a plea of the Fith Amendment. Innocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedure provide safeguards

> for the establishing of the whole, as against the possibility of merely partial, truth.

Id. at 422-23, 77 S.Ct. at 983 (citation omitted).

The Court also emphasized that the grand jury had considered the defendant a potential target for indictment at the time of his appearance. Therefore "it was quite natural for him to fear that he was being asked questions for the very purpose of providing evidence against himself," and "quite consistent with innocence for him to refuse to provide evidence which could be used by the Government in building its incriminating chain." *Id.* at 423, 77 S.Ct. at 983.

Both the general nature of grand jury proceedings and the particular situation of the defendant thus fed the Court's conclusion that his invocation of the privilege had been "wholly consistent with innocence" and consequently inadmissible to impeach the defendant's exculpatory trial testimony. *See id.* at 421-22, 77 S.Ct. 963. Given the risk that the jury had drawn an inference of guilt from the exercise of the privilege, the Court found the error in admitting the evidence for impeachment purposes prejudicial. *See, id.* at 423-24, 77 S.Ct. 963.

When Wells and Gordon appeared before the grand jury investigating the laborers' unions of southern Florida, they faced the same uncertainties and pressures that *Grunewald* found inherent in the grand jury's secret *ex parte* proceedings. Insofar as the record reveals, the two witnesses also could have been justified in the conclusion that they were being interrogated for the express purpose of supplying evidence against themselves. They of course could invoke the privilege properly only to avoid incriminating themselves; the

government has never levied the charge that either improperly claimed the protection of the fifth amendment.

The government bears the burden of establishing the threshold inconsistency necessary to admit impeachment evidence. *See United States v. Hale, supra,* 95 S.Ct. at 2136. So long as a grand jury witness has properly invoked the privilege against self-incrimination, the "insoluble ambiguity" of his silence, *See Doyle, supra,* 96 S.Ct. at 2244, precludes demonstration of that requisite inconsistency. Accordingly, the predicate for impeachment use of Wells' and Gordon's grand jury silence was lacking.

3. *Prior Silence of a Defense Witness*

[3] That we are concerned with the testimony of defense witnesses, rather than a defendant, neither renders inapplicable for requirement of threshold inconsistency nor provides any additional basis for concluding that the requirement was here met. The Eighth Circuit has squarely applied *Grunewald* in the witness context. *See United States v. Williams,* 464 F.2d 927 (8th Cir. 1972). Drawing on *Grunewald's* description of the nature of grand jury proceedings, the court in *Williams* rejected the argument that the refusal of a defense witness to testify before a grand jury was inconsistent with his trial corroboration of the defendant's exculpatory story. The court concluded that the improper impeachment had been prejudicial where the single defense witness's corroboration had been critical, and it reversed the conviction. Similarly, the Second Circuit has stated that where a witness, who is later to supply exculpatory testimony for a criminal defend-

ant, has a reasonable belief at the time of a grand jury appearance that he may be a defendant himself,

> . . . it is perfectly consistent with innocence and with nonincriminatory answers to particular questions to refuse to answer any question at all.

United States v. Tomaiolo, 249 F.2d 683, 691 (2d Cir. 1957).

See also United States v. Natale, 526 F.2d 1160 (2d Cir. 1975), *cert. denied*, 425 U.S. 950, 96 S.Ct. 1724, 48 L.Ed.2d 193 (1976); *United States v. Glasser*, 443 F.2d 994, 1004-06 (2d Cir.), *cert. denied*, 404 U.S. 854, 92 S.Ct. 96, 30 L.Ed.2d 95 (1971).[2]

The conclusion of these two courts that a defense witness's prior silence before a grand jury and trial testimony exculpating the defendant lack sufficient inconsistency to justify impeachment use of the silence is well-founded. *Grunewald* teaches that the many factors that may lead an individual to remain silent before the grand jury make it impossible to draw any reasonable inference that a subsequent protestation of his own innocence has been fabricated. Assuming a reasonable belief at the time of the witness's grand jury appearance that he himself may be a defendant, any suggestion of inconsistency between his silence and subsequent testimony exculpatory of someone else can certainly be no stronger.

[2]*Natale* and *Glasser* are concerned more directly with the prejudicial impact of explicit attempts to elicit from a defense witness the fact that he previously exercised the fifth amendment privilege, rather than the lack of probative impeachment value in witness's prior silence. Therefore these cases do not explore the issue of consistency between grand jury silence and exculpatory trial testimony. The opinions do cite *Williams* and *Tomaiolo* with approval, however, and they make clear that a defense witness' prior silence before a grand jury is not a proper subject of cross-examination in the Second Circuit.

4. *The Potential for Prejudice*

As against the complete lack of probative value in the defense witness's refusal to testify before the grand jury, impeachment by that silence runs some risk of two varieties of prejudice. First, where the jury learns that the witness's silence was an exercise of the privilege against self-incrimination, there is a danger the jury will improperly infer guilt on the part of the witness and, depending on the circumstances, transfer that inference to the defendant. *See United States v. Natale, supra; United States v. Glasser, supra.* Second, without an understanding of the uncertainties a witness faces in testifying before a grand jury, a juror may well attribute undue significance to the fact a witness offered no response to the prosecutor's questions before that tribunal and may thereupon disbelieve the witness's trial testimony. To allay any such tendency would require the defense somehow to instruct the petit jury on the difficulties of testifying before a grand jury, an abstract digression that would at best district the jurors and at worst unduly emphasize the issue of silence, exacerbating any tendency to draw the improper substantive inference that the witness was hiding guilt that may taint the defendant.[3]

[3]In a similar vein the D.C Circuit has held that a prosecutor cannot attempt to impeach a defense witness by eliciting on cross-examination that the witness had not testified at the defendant's preliminary hearing. See *United States v. Huff*, 143 U.S.App.D.C. 163, 442 F.2d 855 (1971). Given the many reasons for the defense not to put on evidence at such a hearing, the court found the witness's failure to testify there of little if any probative value. The court also recognized that a jury might tend to find significance in the failure to testify. Rather than require defense counsel to combat that prejudicial tendency with a demonstration of the general nature of preliminary hearings and the particular considerations that governed the hearing in question, the court prohibited the impeachment use of a witness's failure to testify at a preliminary hearing.

[4] A defense witness's prior refusal to supply testimony to a grand jury before which he had a reasonable belief that he might be a defendant himself has no proper significance as impeachment evidence. Use of the evidence for that purpose risks prejudice. Accordingly, we hold that the government may not attempt to impeach a defense witness by eliciting such a prior refusal to testify before a grand jury.[4]

B. The Constitution Inviolate

[5] Appellant argues that the impeachment use of the prior silence of Wells and Gordon not only violated the rules of evidence, but also transgressed constitutional boundaries staked out in *Doyle v. Ohio, supra*. *Doyle* did elevate to a constitutional level the Court's earlier holding that impeachment use of a defendant's post-arrest, post-*Miranda* warning silence was improper as an evidentiary matter. *See United States v. Hale, supra*. Because we find that the Court's reasons for being party to that particular ascension do not transfer to the situation before us, we reject appellant's claim of constitutional error.

Certainly the *Doyle* Court reaffirmed the recognition in *Hale* of the inherent ambiguity of post-arrest silence. However, the Court expressly noted that its consideration of the lack of probative value of the Ohio defendants' silence was unnecessary to its constitutional holding. *Id.* 96 S.Ct. at 2444-45 n. 8. Rather, that holding followed from the fundamental unfairness of employing

[4]This holding of course does not apply to the type of situation discussed in *United States v. Fairchild*, 505 F.2d 1378 (5th Cir. 1975), and noted in *Doyle v. Ohio, supra*, 96 S.Ct. at 2245 n. 11, in which the defendant (here, a defense witness) has conveyed the impression that he affirmatively cooperated with the government in all matters relating to the case.

a person's invocation of the right against self-incrimination to his disadvantage as he stands trial.

Justice Powell's majority opinion described that unfairness in the context presented by *Doyle* of post-*Miranda* warning silence:

> . . . while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Id. 96 S.Ct. at 2245.[5]

That same unfairness may be present whenever the government attempts to exploit a proper invocation of the privilege, whether or not preceded by explicit warnings of the right to remain silent. Thus, whatever the ultimate validity of the proposition that *Miranda*-type warnings are required in the grand jury room, *see United States v. Washington*, ... U.S. ....., 97 S.Ct. 1814, 52 L.Ed.2d 238 (1977); *United States v. Wong*, ... U.S. ....., 97 S.Ct. 1823, 52 L.Ed2d 231 (1977); *United States v. Mandujano*, 425 U.S. 564, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976), the factors found constitutionally intolerable in *Doyle* might be thought to extend to a defendant's silence in the face of grand jury questioning.

[5]The Court went on to quote with approval from Justice White's concurrence in the judgment in *United States v. Hale, supra*, 95 S.Ct. at 2139. "Surely *Hale* was not informed here that his silence, as well as his words, could be used against him at trial." *Doyle, supra*, 96 S.Ct. at 2245.

We need not resolve this question today. A defendant cannot complain where the prosecutorial abuse is of *another's* exercise of the constitutional privilege against self-incrimination.[6] That privilege is a personal one. It is established that a defendant may not object to the violation of another person's privilege. *See Doyle, supra,* 96 S.Ct. at 2248 (Stevens, J., dissenting) and cases cited. Thus a defendant cannot complain of any *Doyle*-type unfairness that might be seen in impeachment of a defense witness by a prior refusal to testify before a grand jury.[7]

C. Error Harmless

[6] Because we have found the error in impeaching Wells and Gordon by their grand jury silence to be nonconstitutional, the strict guidelines set out in *Chapman v. United States,* 547 F.2d 1240, 1249-50 (5th Cir. 1977), for testing the harmlessness beyond a reasonable doubt of a *Doyle* violation are inapplicable. Rather we must apply the test of *Kotteakos v. United States,* 328 U.S. 750, 764-65, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946):

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[6]*Doyle* itself specifically reserved the question whether constitutional error would obtain upon the use of post-arrest, post-*Miranda* warning silence to impeach a defense witness rather than the defendant.

[7]Note that in *United State v. Sobell,* 314 F.2d 314 (2d Cir. 1963), the court opined that on the assumption the *Grunewald* holding achieved constitutional dimensions, those constitutional implications would be limited to the person whose claim of the privilege was used against him.

Beyond the unfairness of exploiting a claim of the privilege, we cannot conclude that the grand jury silence of a defense witness is so utterly lacking in probative value yet highly charged with prejudicial potential that its use merits universal constitutional condemnation. We need not forecast whether the use of such evidence might in some particular case be so critically prejudicial as to rise to the level of a due process violation. The case at bar, however, is not such a case.

> . . . if [we] cannot say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substanial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

See United States v. Constant, 501 F.2d 1284, 1289 (5th Cir. 1974), *cert. denied,* 420 U.S. 910, 95 S.Ct. 830, 42 L.Ed.2d 840 (1975).[8]

[7,8] Oft times the alleged heinousness of a crime provides the judicial vehicle for a finding of harmless error. That factor, however, is never an appropriate consideration. Here, in reading and examining the record, we have attempted to strain out the quality of the alleged crime and to confine our attention to the residue of its basic actual underpinnings. The nature of the crime has not entered our evaluation of the evidence, which we find to be overwhelmingly convictive. Cognizant that "harmless-error rules can work very unfair and mischievous results", *Chapman v. California,* 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967), we are nevertheless convinced that the improper impeachment of Wells and Gordon tainted appellant's trial at most to such a marginal

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[8]*Kotteakos* continues to provide the standard for judging nonconstitutional errors in this circuit. See, *e.g., United States v. Martinez,* 536 F.2d 1107 (5th Cir. 1976); *United States v. Jennings,* 527 F.2d 862 (5th Cir. 1976); *United States v. Harbolt,* 491 F.2d 78 (5th Cir. 1974); *United States v. Resnick,* 488 F.2d 1165 (5th Cir. 1974).

extent that the judgment must be affirmed under the above standard.

The government presented an extremely powerful, if circumstantial, case against the appellant. Largely unchallenged documentary evidence established that appellant made it a common practice to bill identical expenses, chiefly travel and entertainment, to each of local 666, local 478, the District Council, and the ILU, and to obtain full reimbursement from each. The vast majority of the reimbursement checks were cashed by Rubin at a savings and loan association; a few were deposited in an account Rubin maintained there. Similar documentation established that when attending a conference on behalf of the various employee welfare benefit plans of which he was a trustee, Rubin would obtain from each organization the amount it had set to cover an individual's full expenses at the conference.

None of the entities to which appellant addressed his duplicate billing had any notice of his reimbursement from other sources. Indeed, the government established that in local 666, the constitution of which required two signatures on all checks from the union treasury, Secretary-Treasurer Henry signed all checks in blank. Appellant, president and business manager of 666, supplied the payee and amount.

Appellant did not deny the fact of multiple billing. Rather, he attempted to show that his actions were unaccompanied by the intent requisite to convictions under 29 U.S.C. § 501(c).[9] Rubin claimed that organ-

[9]On the contents of that intent requirement, *see United States v. Ottley*, 409 F.2d 667 (2d Cir. 1975); *United States v. Silverman*, 430 F.2d 106 (2d Cir. 1970).

izing drives and the maintenance of relationships with management required him to keep a large cash fund at the ready. He testified that in a campaign to unionize laborers at a particular plant, he had frequently had to give a subordinate organizer as much as several thousand dollars cash to compensate workers helping in the drive and to entertain others. Checks were too slow and cumbersome in the brief duration of a campaign; laborers traditionally preferred cash. Cash would frequently be required by the establishment at which, over lunch or a drink, prospective members were encouraged to join. Cash was sometimes necessary to cover workers' emergency needs during a strike. Finally, cash was an important part of appellant's efforts to entertain management. Rubin testified of the importance of maintaining an "image of affluence." He related that he attempted always to carry four or five thousand dollars in cash, with which he could pick up large bills.

Appellant explained that he had employed the multiple billing practice to generate this cash. He testified that local 666 and the District Council had authorized him to make whatever expenditures from the union treasury he deemed in the interest of the organization. He had concluded that this authorization legitimized the multiple billing and the use of the cash fund for general organizing and maintenance of relations with management. As for the employee welfare benefit plans, Rubin testified that a lawyer had advised him that it was legal to receive conference expense advances from more than one entity, so long as any excess over actual expenses was spent on union business.

On cross-examination, Rubin testified that he maintained no records of the cash fund or disbursements

from it. Moreover, the government's evidence contained material responsive to appellant's story. The annual reports of each relevant entity, required by the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531, showed the amount of expenses that entity had reimbursed, but the cash fund and the disbursements from it never appeared. The government introduced evidence tending to show that an audit of any individual organization involved would not have disclosed the multiple reimbursements. Finally, the government documented a multitude of expenditures not included in the indictment that appellant had not covered out of any cash fund, but for which he had, instead, received reimbursement.

Suffice it to say that after appellant told his story the government's case remained extremely strong. According to his own testimony, appellant had the legitimate authority to draw a check on one of the union treasuries whenever organizing or entertaining expenses created the need for cash. Instead he generated cash by copying assorted bills and charging them two to four times over to various entities.

The witnesses called by appellant corroborated only one aspect of his story: the fact of numerous and large cash expenditures by Rubin, either as disbursements to subordinates for organizing or as payments by himself in entertaining. Including Wells and Gordon, eight witnesses testified to this effect, six from the union ranks and two contractors.

Larry Feder, an organizer for local 666, was perhaps the chief union witness. He testified that over the relevant years he had received between $35,000 and $40,000 cash from Rubin for organizing expenses. Additionally, he had witnessed Rubin spend large amounts of cash at dinners with management.

The government attacked Feder's credibility in numerous ways. As with all the organizers who testified, the government established the large salary received by Feder at appellant's direction. Feder admitted he had kept no records of any of the thousands of dollars he claimed to have received. Most importantly, the government offered the testimony of Department of Labor Agent William Gamble, who had interrogated Feder regarding the money he received as an organizer, specifically inquiring how his expenses were paid. Feder had told Gamble that expenses were reimbursed upon the submission of receipts. No mention was made of ever receiving cash from appellant. The prosecutor repeatedly emphasized Feder's statement to Gamble in his closing argument.

Jake Wright, a district council organizer, offered similar testimony, accounting for approximately $6,000 cash received from appellant. On cross-examination, Wright first testified that he thought he had told Agent Gamble about the cash payment in response to questions Gamble asked about organizing expenses. A review of his statement to Gamble refreshed his recollection to the contrary. Moreover, the government brought out Wright's grand jury testimony that he did not know what Rubin did in his union offices. Again, the prosecutor emphasized this impeachment material in argument.

Besides Wells and Gordon, the defense called two other union witnesses of relatively minor importance. A laborer from local 478 testified that he had received $2400 cash from appellant for work in an organizing

campaign. A shop steward from local 478 testified that he had received $1,000 cash from Jake Wright in each of two campaigns.

Wells and Gordon each accounted for around $13,000 cash received from Rubin for organizing expenses, though Wells testified at greater length and in more detail. Apart from any effect of the impeachment by grand jury silence, Wells's testimony at many points lacked credibility in its own right. On direct he attempted to explain the absence of receipts for his organizing expense. Wells testified that when an organizer takes a recruit out to lunch, he cannot impress the prospect if he has to obtain a receipt. Wells further testified that he did sometimes manage to collect receipts, but that these were frequently lost when his wife washed his clothes. The prosecutor pointed to Well's lack of credibility as well as his grand jury silence in argument. Apart from Gordon's grand jury silence, the government attacked his testimony only as it did that of each organizer—with the facts that appellant controlled his salary and that Gordon had kept no records of the cash he received from Rubin.

In short, the defense put on four union witnesses of significance in the effort to corroborate the fact of union related cash expenditures by appellant. With the possible exception of Gordon, who testified most briefly of the four, each faced sharp attack from the government apart from the impeachment use of Wells's and Gordon's grand jury silence. The prosecutor emphasized those attacks in closing argument at least as forcefully as the references to the silence of Wells and Gordon.[10]

[10]We reject the claim that the prosecution's argument tended to lump all the defense witnesses under the refusal of Wells and Gordon to testify. When read in context, each of the references to their grand jury silence is accompanied by distinct references to the statements given to Agent Gamble by Feder and Wright that were inconsistent with their trial testimony and to Wright's inconsistent statement to the grand jury.

[9] The jury's verdict rests on either of two lines of reasoning. Given the strength of the government's case, the jury could well have believed the defense witnesses' testimony that Rubin made many large cash payments related to union activities and still have concluded that Rubin knew the multiple reimbursments were unauthorized or that the multiple reimbursements were unrelated to any such cash payments, sufficient for them to find violations of 29 U.S.C. § 501(c). That Rubin was a good union man is no defense to the requirement of a modicum of accountability for moneys expended for the union. The embezzlement statute imposes no penny pinching requirements, but neither does it afford blanket exculpation for open-handedness and benignity in the spending process. The jury could easily have concluded that union activities require big spending and that Rubin was a free spender, but still have believed that he knew accumulating funds by duplicate billing was unauthorized and that the funds so accumulated were not benignly employed. In that case the improper impeachment obviously had no impact.

Alternatively, the jury may have disbelieved all or part of the testimony regarding Rubin's cash expenditures. We find nothing in the cross-examination or argument regarding the grand jury silence of Gordon and Wells that would have any significant tendency to impugn the testimony of Feder and Wright. To the extent the jury disbelieved the latter pair, we are

confident they did so on the basis of the substantial proper impeachment of the two.

Thus it appears that at most the improper impeachment tended to discredit Gordon's brief comments and Well's testimony, not without substantial independent implausibility. The effect of that tendency must have been slight. There was no defensive attempt to match the total allegedly embezzled sums to the expenditures related by the witnesses. Each individual witness did not occupy a linchpin position. Thus the possibility that the jury believed Feder and Wright but rejected the defense because of the improper impeachment of Gordon and Wells is remote. Moreover, given the sum of Gordon's and Wells's testimony, the possibility is equally slim that the jury disbelieved the remaining defense witnesses but would have accepted the defense absent the improper impeachment. In light of the balance of the evidence and the place of Wells and Gordon in the defensive lineup, we cannot conclude that the erroneous impeachment use of their refusal to testify before the grand jury was prejudicial under the *Kotteakos* standard.[11] Were that balance any different or the testimony of Wells and Gordon of any more apparent importance, different considerations

[11]Appellant does not and could not claim that the single explicit reference during Wells's testimony to the privilege against self-incrimination prejudiced him by creating a substantive inference of Wells's guilt that transferred to the defendant. *See United States v. Natale, supra; United States v. Glasser, supra.* That reference, though volunteered by Wells, was certainly foreseeable by the prosecutor. The government cannot escape blame for any prejudice that might have arisen. Nevertheless it is clear that no such prejudice did arise. The government at trial consistently showed that the subordinates knew nothing of appellant's financial machinations; there was in the circumstances no suggestion to the jury of the witnesses' involvement in criminal behavior related to the charge against appellant.

would obtain. As this record stands, however, we harbor nothing approaching a "grave doubt" that the error did not exert a substantial influence on the jury. We think it clear that the error was harmless.

II. Other Claims

We may readily dispose of appellant's remaining attacks on the validity of his conviction.

A. Failure to Record Grand Jury Proceedings

Appellant complains that the prosecutor's comments to the grand jury were not recorded. The trial court denied motions to require recording of the grand jury proceedings and to dismiss the indictment for failure to do so. The government did record the testimony of witnesses before the grand jury.

[10] The far better practice is to record grand jury proceedings, including the comments of the prosecutor. *See United States v. Peden,* 472 F.2d 583 (2d Cir. 1972). Nevertheless there remains no constitutional or statutory requirement of recording. *See United States v. Flanagan,* 445 F.2d 263 (5th Cir. 1971), *United States v. Howard,* 433 F.2d 1 (5th Cir. 1970). Accordingly, the failure to do so, standing alone, provides no predicate for reversal.

[11] A defendant may nevertheless obtain what grand jury records do exist or receive a hearing on what has transpired in the grand jury room upon a showing of need. *See United States v. Tucker,* 526 F.2d 279, 282 (5th Cir. 1976); *United States v. Howard, supra,* 433 F.2d at 2-3. That showing, however, must include more than unsubstantiated, speculative assertions of improprieties in the proceedings.

[12] Appellant's only allegation of prosecutorial misconduct in the grand jury proceedings themselves is that the prosecutor concentrated his questioning of several witnesses on their conversations with their own or appellant's lawyers. From this appellant argues that the prosecutor improperly misinformed the grand jury that Rubin was obstructing the investigation. Assuming a defendant's substantive right to dismiss an indictment based on prosecutorial misconduct so flagrant as to deny fundamental fairness, we cannot regard appellant's speculation as a sufficient demonstration of need to require reversal for the district court's failure to require recording, to order production of existing grand jury records, or to conduct a hearing inquiring into the prosecutor's action.

B. Electronic Surveillance Claim

[13, 14] Appellant also claims that the trial court improperly handled his suggestion that government agents had conducted illegal electronic surveillance of his office. Under 18 U.S.C. § 3504(a)(1), a defendant by asserting a claim of such surveillance requires the government to affirm or deny its occurrence.[12]

This court has made clear that a "mere assertion" by a criminal defendant claiming surveillance of himself is sufficient without supporting evidence to trigger the government's obligation to affirm or deny. *See United States v. Tucker*, 526 F.2d 279, 282 (5th Cir. 1976). However, we have also announced adherence to the

[12]18 U.S.C. § 3504(a)(1) reads in full as follows:
Upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act.

requirement that the assertion of surveillance be a "positive statement that unlawful surveillance has taken place." *Id.*[13] An allegation that it "may" have occurred will not suffice.

Appellant failed to meet this requirement. Like the claimant in *Tucker*, he filed a motion alleging only a suspicion of surveillance, that he had "reason to believe" someone had eavesdropped on conversations in his office. The statutory provision for discovery of illegal surveillance is a salutary one; it is not too much, however, to require a positive representation of such surveillance before the government's obligation to respond arises. In any event that requirement is already the law of this circuit.

[15] In passing we caution the government against further use of the form of limited response it did offer below. While an unadorned denial of illegal surveillance may suffice to meet the barest, most general accusation, that response must unequivocally deny the occurrence of illegal surveillance, apart from any question whether evidence against the defendant was obtained thereby. While such a general denial may have been the intended import of the government's statement here that "no illegal activities were used to gain evidence concerning Bernard Rubin", the ambiguity created by the negative pregnant would render this response inadequate.

C. Racketeering Instruction

[16] Lastly Rubin objects to the district court's instructions defining the racketeering offense set out in 18 U.S.C. § 1962(c). That section of the Organized Crime Control Act of 1970 provides:

[13]There is no requirement that the allegation be sworn.

> It shall be unlawful for any person employed by . . . any enterprise engaged in . . . interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

The statute defines "racketeering activity" to include the offenses of embezzlement from union funds and employee welfare benefits plans. 18 U.S.C. § 1961(1). A "pattern of racketeering activity" comprehends two or more such offenses within a ten year period. 18 U.S.C. § 1961(5).

Appellant's concern is the requirement of § 1962(c) that the offender conduct or participate in the conduct of an enterprise's affairs, here the affairs of the unions and the benefit plans, *through* a pattern of racketeering activity. He contends that the statute requires the government to prove that he acquired or maintained his labor union control by virtue of acts of embezzlement, or that those acts somehow furthered his ability to participate in or conduct the affairs of the enterprises. The government maintains that to convict under the racketeering statute the jury need only have found two offenses during the course of appellant's employment with one of the organizations.

Then District Judge Fay steered a middle course. Tracking the language of the statute, he instructed the jury that the government had to prove that "through" the two or more offenses, the defendant participated in the conduct of affairs of the various union entities. Judge Fay rejected appellant's only suggestion for incorporating his reading of the statute into the instructions, which was to include a statement

that "through" means "by means of". The judge also rejected an instruction proposed by the government along the lines of its interpretation of § 1962(c).

The language of § 1962(c) is less than pellucid, and appellant's attempt to illumine has appeal. The "Statement of Findings and Purpose" that introduces the Organized Crime Control Act of 1970 contains some suggestion that Congress primarily concerned itself with the use of racketeering activity to gain and maintain positions in legitimate business and labor organizations. *See* Pub. L. No. 91-452, 84 Stat. 922 (1970), *reprinted in* [1970] U.S. Code Cong. and Ad. News 1073. The Ninth Circuit has emphasized the importance to a § 1962(c) prosecution of establishing a substantial nexus between the prohibited activity and the conduct of the enterprise's affairs in *United States v. Campanale,* 518 F.2d 352 (9th Cir. 1975). On the other hand, one court has found the statute satisfied by two or more offenses committed in the course of employment with the relevant enterprises, so long as the offenses are themselves related. *See United States v. Stofsky,* 409 F.Supp. 609 (S.DN.Y. 1973), *aff'd.* 527 F.2d 237 (2d Cir. 1975).

We find it unnecessary to attempt definitive resolution of this issue. Assuming some required relationship between the proscribed acts and the maintenance of union position, we find the trial court's instructions sufficient to convey that meaning. At least we cannot find reversible error in the failure to add the proffered words "by means of". Appellant's definition might have emphasized the nexus, but would have added little content to the definition of so common a word as "through." The evidence was certainly sufficient to sup-

port a conclusion that appellant's embezzled funds served his position in the union organizations.

[17] Having found no prejudicial error in the proceedings that culminated in appellant's conviction, we affirm that judgment. Appellant has, however, raised a substantial objection to one aspect of his sentence, to which we now turn.[14]

III. Forfeiture of Union Offices

[18-20] Upon appellant's conviction of the racketeering charges, the district court issued an order pursuant to 18 U.S.C. § 1963(a) that Rubin forfeit his offices in the various unions and employee welfare benefit plans. Additionally, the court ordered forfeiture in perpetuity of the right to hold any such office. Appellant challenges these orders as beyond the intended reach of the forfeiture sanction.

Part of the Organized Crime Control Act of 1970, (hereinafter the "Act"), 18 U.S.C. § 1963(a) provides:

> Whoever violates any provision of section 1962 . . . shall forfeit to the United States . . . (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

[14]Appellant raised four other claims of error. We reject as meritless the claim relating to discovery of an Internal Revenue Service file and that relating to the presence before the grand jury of Department of Justice Organized Crime and Racketeering Strike Force attorneys. Two claims, one asserting that the trial court improperly excluded certain defense evidence as hearsay and one challenging the court's instructions on the fiduciary duties of a union official under 29 U.S.C. § 501(a), were raised pertinent to the embezzlement counts that charged unlawful salary increases. We need not reach these claims because of the operation of the concurrent sentence doctrine.

The question before us is whether appellant's various offices are "interests", "securities", "claims", or "property or contractual right of any kind", within the meaning of § 1963(a). Given Congress' clear intent to use every possible means to separate those found guilty of racketeering activity and their confederates from the enterprises they had conducted through such activity, we find no basis in language or policy for excluding those offices appellant presently holds from the reach of the forfeiture provision. The terms of that provision, however, cannot reach appellant's right to seek and reattain such offices. That right, moreover, is independently regulated by provisions of the federal labor statutes. Accordingly, we modify the forfeiture order entered below, restricting its application to appellant's incumbent status in the enumerated offices.

As a criminal statute, § 1963 "must be strictly construed, and any ambiguity must be resolved in favor of lenity." *United States v. Enmons*, 410 U.S. 396, 411, 93 S.Ct. 1007, 1015, 35 L.Ed.2d 379 (1973). This canon has particular application to forfeiture statutes. *See Baca v. Commissioner*, 326 F.2d 189 (5th Cir. 1964). Indeed, the forfeiture of a portion of an individual's property as a consequence of a criminal conviction was unknown to the federal criminal law until the passage of § 1963.[15] Such a penal foray bespeaks a need for circumspection.

[15]Unlike *in rem* forfeiture proceedings against contraband or articles put to unlawful use, § 1963 operates against the person of the defendant and includes within the punishment for his crime forfeiture of a portion of his estate. Such a provision, while known to the common law of England and

(This footnote is continued on next page)

That circumspection nevertheless must give fair heed to the clear congressional intent to increase the variety and strength of federal prosecutorial weapons designed to root out and keep out the influence of organized crime in legitimate business and labor organizations. Congress found the traditional criminal sanctions of imprisonment and fine wanting in the effort against infiltration by organized crime. Incarcerating individuals could remove them from the operation of victimized organizations. So long as those individuals retained or could transfer economic leverage over the organizations, however, removing them to prison often resulted only in the rule of proxy or in the promotion of junior members of organized crime. As the Senate Judiciary Committee stated, "What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat." S. Rep. at 78 (1969); *see also Measures Relating to Organized Crime: Hearings on S.30 and Related Proposals Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee,* 91st Cong., 1st Sess. 112 (1969) (statement of Attorney General) (hereinafter "Senate Hearings"); *Organized Crime Control: Hearings on S.30 and Related Proposals Before Subcommittee No. 5 of the House Judiciary Committee,* 91st Cong.2d Sess. 107 (Statement of Sen. McClellan) (hereinafter "House Hearings"); 116 Cong. Rec. 35193 (1970) (remarks of Rep. Sisk).

the colonies, is foreign to the federal criminal law. The 91st Congress recognized that, in passing § 1963, it was partially repealing a statute passed by the First Congress, which in its present form provides that: "No conviction or judgment shall work corruption of blood or forfeiture of estate." 18 U.S.C. § 3563. *See United States v. Mandel,* 408 F.Supp. 679 (D.Md. 1976); S.Rep. 91-617, 91st Cong., 1st Sess 79-80 (1969), hereinafter S.Rep.); 116 Cong.Rec. 35205, 35208 (remarks of Rep. Mirka, Rep. Ryan).

Besides the unprecedented nature of the forfeiture sanction, the uncertain reach of "patterns of racketeering activity"—the gravamen of a § 1962 offense—requires interpretive caution in this area. See Part II. A., *supra.* While addressed to organized crime, the Act is not limited in application to members of that undertaking. *See United States v. Campanale, supra.* Indeed, while we readily conclude appellant was properly convicted under the racketeering provisions we intend to intimate no finding or sense of any kind that he is or has been affiliated with what might be labeled organized crime.

The criminal forfeiture provision is one attempt to destroy that economic base. Thus Congress clearly contemplated forfeiture of any ownership or investment type of interest a defendant might hold in an organization he had conducted through a pattern of racketeering activity. It is just such an interest that would not otherwise terminate with incarceration and would enable a defendant and/or his confederates to maintain control of an organization.

The question is whether that language of § 1963(a) —interest, security, claim, property or contract right— should be extended beyond such financial interests to elective or appointive management positions such as those held by appellant. The scope of the statute is indeed without precise boundaries.[16] Appellant's management positions do not present the same problem regarding perpetuation of control that ownership interest create.

[16]Judge Fay below explicitly noted the ambiguity in the statute:

> I would want the record to show that this is apparently a gray area. It's difficult to say that the statute is precise or specific, because when it talks in terms of forfeiting something to the Government, you would ordinarily think of money or property, or something of that sort. (R. 821-22).

Nonetheless we conclude that appellant's entitlement under the organic documents of the various entities to serve the remainder of his terms of office falls within the language of the statute. So far as the record demonstrates, his rights under the charter and constitutions of the various organizations to serve out his terms of office are as contractual in nature as an employee's rights under an employment agreement for a term of years, terminable for cause. The terms of the forfeiture provision reach beyond any narrow definition of capital investment, embracing "property or contractual right of any kind." The Senate Judiciary Committee wrote that the language "is designed to accomplish a forfeiture of any interest of any type in the enterprise . . . ." S.Rep. at 79. While such open-ended intent cannot legitimate extension of the sanction beyond the statute's plain terms, limited to their reasonably foreseeable scope, neither can it be disregarded.

[21] Construing § 1963 to encompass the positions appellant holds also accords with congressional intent. First, retention of a management position, even *in absentia*, could permit a defendant convicted under the racketeering provisions to continue to exert an influence over an enterprise. Moreover, although Congress' primary concern in enacting the forfeiture provision was eradicating organized crime's economic base, which more readily translates into ownership interests, it also intended forfeiture fully to serve the broader goal of legally separating persons who run an enterprise through the defined racketeering activity from the enterprise itself. *See* S.Rep. at 79.[17] Although applying

[17]Senator McClellan, a sponsor of the provision, explained to the House subcommittee that the forfeiture sanction would

§ 1963 to appellant's offices may serve only this broader goal and be unrelated to eliminating self-perpetuating economic power, there remains no reason to conclude that those offices lie outside the sanction's reach.

[22] In short, a reasonably cautious interpretation of the language of the forfeiture provision brings within its reach the right under an organization's charter to serve out a specified term in an elective or appointive management position of substantial influence. Such an interpretation serves the policies identified by Congress in enacting the statute. Because both those conditions are satisfied, the order that appellant forfeit his present positions in the various union entities is proper.[18]

The forfeiture sanction, however, can have no proper effect on appellant's right in the future to seek union office, including those offices he must now give up. That right to run for and hold office is not something appellant as an individual has acquired or maintained with respect to the various union entities; it is the same right possessed by all members of all unions. In no sense a contractual or property right held by the individual against a union, the right to seek union office is rather guaranteed by federal statute. *See* 29 U.S.C. 481(e). The language of the new penal statute does not extend to such a right.

Moreover, the forfeiture provision itself contains no prophylactic ban on reacquisition of the same interest

"punish the criminal appropriately by forfeiting to the government his ill-acquired interests . . . and directly aid the business community by expelling him from the legitimate business he abused." House Hearings at 107.

[18]That those offices cannot be meaningfully transferred to the United States is of no moment. 18 U.S.C. § 1963(c) provides that a forfeited interest not exercisable by the United States shall terminate.

as that forfeited. Nothing in § 1963 prevents an individual from investing funds in an enterprise in which he has had to forfeit a previous investment. Such an interpretation does not rob the sanction of its deterrent effect, which results from the heavy financial loss that can be visited by a forfeiture order. *See* Senate Hearings at 388 (statement of Assistant Attorney General Will Wilson). Even in the context of a management position, forfeiture without restriction on reentry removes from the convicted defendant the advantages of incumbency.

Finally, restricting the operation of the sanction to presently-held interests is supported by the fact that Congress specifically attended to the problem of reacquisition in the civil remedies of § 1964. Included among those remedies are injunctions against a defendant conducting in the future the same type of enterprise he conducted through racketeering activity in the past. That powerful measure was rightfully addressed to the district court's equitable discretion and not made a part of the forfeiture sanction that attaches automatically upon conviction under § 1962.

The analysis thus far would apply to a distinction between any presently-held interest and the right to regain that interest. Limiting forfeiture to the former, makes particular sense in the context before us, moreover, because labor code provisions independently regulate appellant's right to seek union office in the future.

Assuming appellant's embezzlement convictions become final, it will be unlawful for him to serve as an officer of a labor organization or a trustee of an employee welfare benefit plan. 29 U.S.C. §§ 504, 1111. That ban continues for five years following the

conclusion of imprisonment, subject to the discretion of the Board of Parole to lift the restraint. Nowhere in the legislative history of the Organzied Crime Control Act of 1970 does there appear a reference to this restraint on the right to seek union office, which attaches upon conviction of many of the offenses included in the 1970 Act's definition of racketeering activity.

We do not read the criminal forfeiture provision as imposing a permanent ban on reacquisition of any covered interest. The statute creates no rule of perpetuity. It has a limited temporal reach with which we have no right, no power, to tamper. In any case we cannot find in § 1963 any authority to impose the radical measure of a lifetime ban on holding union office when that statute was passed completely without regard to the five year ban in existence at the time of enactment. Insofar as the district court ordered appellant to forfeit his right to seek and hold office in the labor organizations and employee welfare benefit plans, that order must be reversed. Appellant's rights in that regard are committed to the operation of 29 U.S.C. §§ 504, 1111.

CONCLUSION

The judgment of conviction is AFFIRMED. The order of forfeiture is AFFIRMED AS MODIFIED.

APPENDIX B.

United States of America, Plaintiff-Appellee, v. Bernard G. Rubin, Defendant-Appellant. No. 76-1143.

United States Court of Appeals, Fifth Circuit.

March 15, 1979.

Appeal from the United States District Court for the Southern District of Florida.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before GOLDBERG and HILL, Circuit Judges and KERR*, District Judge.

GOLDBERG, Circuit Judge:

Following a jury trial in United States district court, Bernard J. Rubin was convicted of 103 counts charging him with embezzlement of union and employee welfare benefit plan funds, racketeering, income tax evasion, and failure to keep labor union records. The sentences on all counts were to run concurrently. Rubin appealed his convictions to this court, and we affirmed. *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977). We held that 101 of his convictions were either free of error or unaffected by any errors committed by the trial judge. The sentences on his other two convictions were not longer than, and were to run concurrently with, his sentences on some of the 101 counts we examined; we therefore declined to review those convictions, something we thought we were entitled to do under the concurrent sentence doctrine. That doctrine is frequently stated as follows: the existence of one valid conviction may make unnecessary the review

*Senior District Judge of the District of Wyoming, sitting by designation.

of other convictions when concurrent sentences have been given. *See Hirabayashi v. United States*, 320 U.S. 81, 85, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943).

Rubin successfully petitioned the United States Supreme Court for a writ of certiorari, claiming that we had improperly invoked the concurrent sentence doctrine. The Supreme Court vacated our judgment remanding the case to us for "further consideration in light of the position asserted by the Solicitor General in his supplemental brief." *Rubin v. United States*, ... U.S. ....., 99 S.Ct. 67, 58 L.Ed.2d 102 (1978) (mem). In that brief, the Solicitor General argues that we should not have applied the concurrent sentence doctrine because there is a substantial likelihood that the two unreviewed convictions will adversely affect Rubin's parole. Upon consideration of the information provided by the Solicitor General, we agree that in this case our application of the concurrent sentence doctrine was improper. We will explain why we should not have applied the doctrine in the following section.

I.

The United States Supreme Court has called the concurrent sentence doctrine "a rule of judicial convenience." *Benton v. Maryland*, 395 U.S. 784, 791, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). We have stated that in deciding whether or not to apply this rule of judicial convenience, we should consider whether the defendant will suffer adverse collateral consequences from the unreviewed convictions. *See United States v. Binetti*, 547 F.2d 265, 269 (5th Cir. 1977); *Government of the Canal Zone v. Fears*, 528 F.2d 641, 644 (5th Cir. 1976); *United States v. Strickland*, 509 F.2d 273, 274 (5th Cir. 1975). Despite such state-

ments, we have often applied the doctrine mechanically without really considering the adverse consequences. Because it may have been unclear in our past cases, we now expressly hold that a court may not apply the concurrent sentence doctrine at least in the situation where there is a significant likelihood that the defendant will suffer adverse collateral consequences from the unreviewed conviction.[1]

Rubin claims that he has established such a significant likelihood of adverse collateral consequences. Specifically, he says that the two unreviewed convictions increase the amount of time he must serve in prison before he can be paroled. Those two convictions were for embezzling a total of approximately $330,000. Among the convictions we reviewed and found valid were 84 other embezzlement counts involving a total of approximately $55,000.[2] Rubin claims that the amount he is said to have embezzled will affect the date on which he is paroled.

To determine if Rubin's assertions are correct, we look to the United States Parole Commission guidelines. The Parole Commission uses these guidelines to determine how long a prisoner serves before being released on parole. *See* 18 U.S.C. § 4206 (1976); 28 C.F.R.

[1]Our holding clearly does not invalidate the concurrent sentence doctrine. It only indicates that it may be applied less frequently. Although we conclude that Rubin has established a significant likelihood of adverse collateral consequences from his unreviewed convictions, we express no opinion about what other circumstances will fall within this limitation on the concurrent sentence doctrine.

[2]The 84 embezzlement convictions we reviewed charged Rubin with taking multiple reimbursements for expenses. The 2 convictions we did not review charged Rubin with embezzlement by taking unauthorized salary increases. The remaining 17 convictions we found valid were for racketeering, income tax evasion, and failure to keep union records.

§ 2.20 (1978). Although the Parole Commission may depart from its guidelines "[w]here the circumstances warrant," 28 C.F.R. § 2.20(c) & (d) (1978), it almost always follows them in any given case. *See, e.g., Ruip v. United States,* 555 F.2d 1331, 1333 (6th Cir. 1977); *United States v. Salerno,* 538 F.2d 1005, 1007 (3d Cir. 1976). Under the guidelines, the customary length of time an offender serves is determined in part by the offense severity rating the Parole Commission assigns to the offense or offenses for which a prisoner is incarcerated.[3] The severity rating for the offense of embezzlement is based on the amount of money embezzled. The possible classifications are "low moderate" (less than $1,000 embezzled), "moderate" ($1,000 to $19,999), "high" ($20,000 to $100,000), and "very high" ($100,000 to $500,000). 28 C.F.R. § 2.20 (1978).

In assigning this severity rating, the Parole Commission looks to the "actual offense behavior" that can reliably be established. United States Parole Commission Research Unit *Guideline Application Manual* (Nov. 1977). Since the offenses for which the prisoner is incarcerated are deemed reliably established, the Parole Commission automatically considers those convictions. *Id.* Thus, in Rubin's case, the Parole Commission will consider all 86 embezzlement convictions. Because

[3]28 C.F.R. § 2.20(b). The recommended range of time to be served before parole is also based on the prisoner's personal characteristics. *Id.* The Parole Commission assigns each prisoner a "salient factor score" based on the following characteristics: number of prior convictions, number of prior incarcerations, age at first commitment, parole and probation history, employment history, history of heroin or opiate dependence, and whether the commitment offense involved auto theft or checks. United States Parole Commission Research Unit, *Guideline Application Manual* (Nov. 1977).

more than $200,000 is involved, it will assign these parole offenses a "very high" severity rating. If, however, the Parole Commission did not consider the two unreviewed counts, only $55,000 would be involved. The Parole Commission would then assign the parole offenses only a "high" severity rating and would be likely to parole Rubin sooner.

It does not necessarily follow, however, that we should have reviewed the other two convictions. When a defendant is convicted on several counts, one of which is reversed on appeal, the Parole Commission will not automatically drop the reversed count from its consideration in determining the offense severity rating. Because the Parole Commission looks to the "actual offense behavior" which can be reliably established, it will still consider a reversed conviction in determining the offense severity rating, if the reversal was on grounds not relating to guilt or innocence.[4] However, if the court of appeals reverses one of the prisoner's convictions on grounds relating to guilt or innocence, then the reversal does indicate that the conviction is not reliably established, and the Parole Commission would not consider it in determining the offense severity rating.

The two claims of error Rubin raised in the court of appeals were related to his guilt or innocence of

[4]Accordingly, we may apply the concurrent sentence doctrine to avoid reviewing counts not challenged on grounds relating to guilt or innocence without worrying that we will prolong the period of time the prisoner must serve before being released on parole. This is so because if we reverse a conviction on grounds unrelated to guilt or innocence, the Parole Commission will give the conviction the same weight it gives to a conviction we affirm. We wish to note that although we rely on the Parole Commission's practices to determine whether or not we should apply the concurrent sentence doctrine, we are not, by our reliance, endorsing those practices.

the two unreviewed embezzlement convictions. Therefore, if we had reviewed and reversed those convictions, we must assume that the Parole Commission would not consider them in determining the severity rating for Rubin's parole offenses. If the Parole Commission omitted those convictions in determining the offense severity rating, it would drop the rating from a "very high" to a "high" severity. And since under the Parole Commission guidelines the recommended term of incarceration increases as the offense severity rating increases,[5] there is a significant likelihood that the two unreviewed convictions will lengthen Rubin's incarceration.

We, therefore, hold that we should not have applied the concurrent sentence doctrine in this case. In so holding, we bow not only to the hierarchical position of the Supreme Court, but to its superior wisdom as well. We will now consider the points of error Rubin raised with respect to the two unreviewed convictions.

II.

The two counts we did not review charged Rubin with embezzlement in his position as a labor organizer by taking unauthorized salary increases, with knowledge that the increases were unauthorized, in violation of 29 U.S.C. § 501(c).[6] Rubin argues that the indictment

[5]For example if Rubin were to receive a "very good" personal characteristics rating, the recommended period of incarceration would be 26-36 months if the offense severity rating were "very high" and only 16-20 months if the offense severity rating were "high".

[6]The section provides, "Any person who embezzles . . . any of the moneys . . . of a labor organization of which he is an officer . . . shall be fined not more than $10,000 or imprisoned for not more than five years, or both." 29 U.S.C. § 501(c) (1976).

and the jury instructions may have erroneously caused the jury to conclude that the mere taking of unauthorized salary increases, without knowledge that they were unauthorized, constitutes a § 501(c) embezzlement offense. He claims that the indictment equated the two, and he argues that the jury's mistaken belief may have been reinforced by the judge's instructions to the jury on Rubin's fiduciary duties under 29 U.S.C. § 501(a).[7]

We completely agree with Rubin that the mere taking of unauthorized salary increases does not consitute a § 501(c) violation. Criminal intent is an element of a § 501(c) offense. *See, e.g., United States v. Goad,* 490 F.2d 1158 (8th Cir. 1974). One must *willfully* take the salary increases, *with knowledge that the increases are not authorized according to the Union's constitution and bylaws,* to violate § 501(c). *United States v. Goad,* 490 F.2d at 1165. *See also, United States v. Nell,* 526 F.2d 1223, 1233 (5th Cir. 1976) (approving *Goad*).

We do not agree, however, that the indictment or jury instructions indicated otherwise. The indictment specified that Rubin had to act "unlawfully, knowingly, and willfully" to violate § 501(c). And even assuming the indictment was somewhat unclear on the criminal intent requirement, the jury instructions would have dispelled any confusion. The judge's charge carefully explained the elements of the offense, emphasizing several times the intent requirement and outlining what

[7]This section provides that the officers of a labor organization have the duty "to hold its money . . . solely for the benefit of the organization . . . and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder." 29 U.S.C. § 501 (a) (1976).

conduct would constitute the necessary intent. *See* transcript vol. IX pp. 2065-73.

Rubin also complains of the judge's instruction that Rubin had a fiduciary duty under § 501(a) not to spend the Union's money in unauthorized ways. We conclude that this instruction would not have confused the jury, since the judge further instructed that Rubin would not have violated § 501(c) unless he breached this fiduciary duty *with the requisite criminal intent.* We therefore conclude that Rubin's contentions as to the indictment and jury instructions are without merit.

Rubin also argues that the trial court improperly excluded as hearsay certain proffered testimony. To decide whether the testimony was inadmissible hearsay, some background information is necessary. One of Rubin's defenses in this case was lack of criminal intent. He claimed that because he interpreted the unions' constitutions as allowing the salary increases, he was unaware that the increases were actually unauthorized. The constitutions, however, appear clearly to mandate a different procedure for obtaining salary increases from the procedure followed by Rubin. To explain why he nonetheless believed the salary increases were authorized, Rubin testified that his understanding was that the constitutions were not to be interpreted literally. Rubin wanted to explain further that both present and past presidents of the unions, those individuals given the duty of interpreting the constitutions, had told him that the constitutions were flexible, living documents that could be interpreted to fit the needs of a particular local. The trial judge excluded this testimony as hearsay.

The Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant

while testifying at the trial or hearing, offered 'in evidence *to prove the truth of the matter asserted.*". Fed. R.Evid. 801 (emphasis added). As Rubin explained at trial, he did not offer the statements to prove the truth of the matter asserted, but instead to prove that he had heard them and to establish their effect on his state mind. *See Dutton v. Evans,* 400 U.S. 74, 88, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). Thus, Rubin's proffered testimony was not hearsay, and because it was relevant to his state of mind, it should have been admitted. *See* Fed.R.Evid. 401 & 402.

Since the trial court allowed Rubin to testify to his understanding of what the constitutions meant, the government argues that the excluded testimony would have been cumulative only. Thus, the government claims that the trial court's exclusion of the testimony constitutes harmelss error. We disagree. Rubin's testimony about what he considered to be the proper interpretation of the unions' constitutions would have been much more believable had he also testified to the conversations on which he based his conclusions—especially since those conversations were with the officials charged with interpreting the constitutions. Since the testimony was admissible and would have significantly helped establish Rubin's defense, we hold that its exclusion was reversible error.

For the reasons stated in this opinion, we reverse the two unauthorized salary increase convictions, counts 87 and 88, and remand them to the district court. We affirm the remaining 101 convictions for the reasons set forth in our prior opinion. *United States v. Rubin,* 559 F.2d 975 (5th Cir. 1977).

AFFIRMED in PART, REVERSED and REMANDED in PART.

APPENDIX C.

Miami, Florida
December 23, 1974

Honorable C. Clyde Atkins
Judge, United States District Court
P.O. Box 013009
Miami, Florida 33101

Dear Judge Atkins:

Although the matter of the Grand Jury Duces Tecum Subpoena for Florida Administrators, Inc. is now moot pursuant to this Court's recent ruling, I am taking this opportunity to write to you and correct the impressions created by the affidavit of John H. Schulte (see attachment A) in reference to the conduct of the Government in this matter. Since I did not receive the affidavit until the morning of the hearing, I have not had an opportunity to respond. Although the matter, as I've said is moot, I do not feel that the Court should be left with only a limited view of the facts as stated in the Schulte affidavit.

Sometime in November of 1974, Compliance Officer William Gamble interviewed Mr. Grossman, President of Florida Administrators, Inc., and Abe Jordan also of Florida Administrators, Inc., relative to various labor union trust funds administered by Florida Administrators, Inc. This interview was in reference to records which would identify any unauthorized disbursements from said funds to one Bernard Rubin, a union official of various Laborers Unions in south Florida. At this time Mr. Gamble was told that Florida Administrators, Inc. would be happy to aid the Government and for Mr. Gamble to merely write a letter for the material and Florida Administrators, Inc. would give the Govern-

ment anything it requested. Later pursuant to a telephone call between Mr. Grossman and Mr. Gamble, it was decided to subpoena the records before the Grand Jury. Mr. Gamble was told by Mr. Grossman to make the subpoena out to Abe Jordan for said records. No one objected to the amount or type of records requested up to this point.

As a result of these preliminary conversations a subpoena was made out to Abe Jordan calling for the records that had been discussed. (See attachment B) Two agents served Mr. Jordan with the subpoena. Mr. Jordan was very cordial and cooperative at this time. He stated in reference to the subpoena, that that was the correct way to obtain the records from Florida Administrators, Inc. and that he was the correct person to serve. He did not object in anyway to the scope of the subpoena or to his being named in the subpoena. His only comment at the time was that before he complied he would have to await the outcome of a meeting between Mr. Grossman and Mr. Seymour Gopman an attorney for various Laborer's Unions.

Approximately one week before the subpoena was returnable Mr. Jordan called the undersigned. Mr. Jordan asked whether he was to turn the records over to the labor agents or to come before the Grand Jury. I told him that he must appear before the Grand Jury with the records. He stated at that time that he was technically not the custodian of the records. I then asked him who was and who could comply with the subpoena. Mr. Jordan quickly reassured me that even though he was not technically the custodian of the records, that he was the proper person to subpoena and that he would gladly comply with the subpoena. He was very cordial and did not indicate in

anyway that the subpoena would call for any great deal of work. In fact his tone and conversation indicated to me that he either presently had the records in question or that they were easily obtainable and available.

On the day the subpoena was returnable, I received a call from John Schulte. He stated that he represented Florida Administrators, Inc. He further stated that Florida Administrators, Inc. had no objection to complying with the subpoena but that a "client" of Florida Administrators, Inc. informed Florida Administrators that if they complied willingly with the subpoena Florida Administrators would be sued and would possibly lose business. He further stated that this put Florida Administrators, Inc. in an unenviable position and that his concern was protecting Florida Administrators, Inc. As a result, he stated, he would have to file a Motion to Quash the subpoena of Abe Jordan since Mr. Jordan was not technically the custodian of records of Florida Administrators, Inc.

I was very surprised at this call because Florida Administrators, Inc. had been very cooperative from the first moment the Government approached them. As a matter of fact they were the only entity having anything to do with the Laborer's Unions and Bernard Rubin that was cooperative. I told Mr. Schulte that it was pretty sad when the subject of a Grand Jury investigation could interfere with witnesses bringing records to the Grand Jury. I also told him that, in my opinion the fact that a client of Florida Administrators, Inc. might sue them or take away business, was not a sufficient reason for not complying with the subpoena.

Mr. Schulte agreed with me, but stated that his only interest was in protecting Florida Administrators, Inc. He stated that he would file a Motion to Quash. He asked me to excuse Mr. Jordan until it was argued. I stated that I could not excuse him, but instead of wasting his time waiting at the Grand Jury until we went before a Judge, just to make himself available. I then asked if the records subpoenaed were available should a Judge rule in the Government's favor. Mr. Schulte stated that they were. I informed Mr. Schulte that I was surprised that he would allege as the grounds for his Motion to Quash that Mr. Jordan was not the custodian of Florida Administrators, Inc. I told him that Mr. Grossman and Mr. Jordan themselves had directed federal agents to make out the subpoena to Mr. Jordan.

As a result a hearing was held before this Court wherein the Court ordered both parties to get together to attempt to find a proper custodian and to narrow the subject matter of the subpoena so that Florida Administrators, Inc. could determine exactly what records the Government wanted (this, by the way, was the first time anyone speaking on behalf of Florida Administrators, Inc., had stated that they could not comply because the subpoena was not specific enough).

I could not confer with Mr. Schulte on December 10, 1974, as this Court well knows, because of my obligations to the Grand Jury. As a result I told Agent Gamble to call Mr. Schulte to find out who he wanted the Government to make out the subpoena to. I specifically told Mr. Gamble not to discuss the legality of the subpoena in any respect, but merely to determine who was the proper custodian of records. Mr. Schulte refused to name a proper custodian.

During the course of the conversation Mr. Schulte again alluded to the "client" who did not want Florida Administrators to comply with the subpoena. Mr. Schulte stated that "they" informed Florida Administrators, Inc. that Florida Administrators, Inc. should contest the subpoena or that there might be a civil liability on the part of Florida Administrators, Inc. Mr. Gamble responded that that sounded like obstruction of justice —*not on the part of Florida Administrators, Inc.*— but on the part of that person who told Florida Administrators, Inc. not to comply when they were apparently willing to do so. Mr. Gamble asked Mr. Schulte how "they" even knew Florida Administrators, Inc. had been served with a subpoena. To this there was no response. Although no specific names were mentioned Mr. Gamble informed me that it was clear from the conversation that "they" referred to Mr. Bernard Rubin and his attorneys (since the subpoena requests information about disbursements to Mr. Rubin, this is only logical). Several agents who were in the room with Mr. Gamble when the call was made have informed me that Mr. Gamble was extremely polite and did not "get upset" or "make any accusations about Mr. Schulte or Florida Administrators, Inc."

On December 11, 974, I called Mr. Schulte about the form of the subpoena. He stated that he would like us to name each trust fund by its proper name and number. I told him that we would do so in the case of those we knew of by reviewing records and testimony we had already received. I did, however, inform Mr. Schulte that other than witnesses saying that it was so, we had no way of knowing exactly what fund Florida Administrators, Inc. administered for the Laborer's Unions. After discussing the matter

further for sometime, Mr. Schulte and myself tentatively agreed on items A-G and 1-7 in the subpoena (see attachment C). Mr. Schulte then informed me that he could not agree to item II which called for a list of trust funds administered by Florida Administrators, Inc. I again informed Mr. Schulte that we had no way of knowing whether there were trust funds of various Laborer's Local Unions other than those previously mentioned in items A-G and 1-7. I stated that it was important to the Government to determine whether Mr. Rubin had taken any trust funds of a Union and that if there were other Laborer's trust funds other than A-G and 1-7, that the only way we could find that out would be to see a list of those funds administered by Florida Administrators, Inc. and pick those out that had anything to do with any Laborer's Union. Mr. Schulte refused to supply me with such a list. I then requested the name of a proper custodian. Mr. Schulte asked me how long I had been making out subpoenas and to look it up somewhere or make it out to "officers and custodians". I told Mr. Schulte that I wanted to serve a specific person and would he please name one. He said that if the time ever came for serving a subpoena someone would respond. He still refused to name any person.

At this time Mr. Schulte again informed me that the "client" of Florida Administrators, Inc., did not want them to comply with the subpoena although Florida Administrators, Inc., had no particular objection.

I again informed him that this was not a proper reason to file a Motion to Quash and that this seemed like interference with the Grand Jury.

I again informed Mr. Schulte that although we could (and did) specify the labor unions by name and number where we could, we had no possible way of knowing which trust funds they administered for any Laborer's unions (except witnesses who have informed the Government that Florida Administrators, Inc. administered most of the trust funds for all of the Laborer's unions). I again asked for a list so that we could examine the list and subpoena just those funds involving Laborer's unions. Mr. Schulte refused to give us a list and stated that if we kept Item II on the subpoena he would file a Motion to Quash. I asked him if this included items A-G and 1-7 that we already had tentatively agreed on. He stated that it would include everything we asked for.

Subsequently, Mr. Schulte filed his Second Motion to Quash on the second subpoena which contained an affidavit about certain Government conduct.

Although the matter is now moot I thought it important that the Court be informed of exactly what action the Government took and why they did so. In my opinion the Government acted properly in the face of obvious outside interference. A member of the bar should be more responsible when he files an affidavit that could affect the career of a Government agent. In my opinion the Government agents in this particular

investigation have acted entirely properly and circumspectly in the face of serious efforts by the subject of the investigation to frustrate that investigation, not only with respect to Florida Administrators, Inc., but in many other aspects that this Court is aware of.

Respectfully,

/s/ Marty Steinberg
MARTY STEINBERG,
Special Attorney
U.S. Department of Justice

cc: John Schulte, Esq.
1301 DuPont Building
Miami, Florida 33131

APPENDIX D.

Flax and Rosenfield
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February 10, 1975

Honorable C. Clyde Atkins
Judge, United States District Court
P.O. Box 013009
Miami, Florida 33101

Dear Judge Atkins:

My law partner Larry Flax and I are retained attorneys for Bernard Rubin, a prominent labor official who is currently the subject of an investigation being conducted by the United States Department of Justice Organized Crime and Racketeering Strike Force in your district.

In early January, during my presence in Florida for the purpose of representing Mr. Rubin at his appearance before the Federal Grand Jury on January 7, 1975, I was astonished and shocked to learn that Mr. Marty Steinberg, Special Attorney for the Strike Force had addressed an *ex exparte* letter to your Honor which accused Bernard Rubin and his attorneys of obstruction of justice in the pending investigation. I have acquired a copy of this letter; my concern occupies several discrete levels.

Both my partner and I are young lawyers. Yet, we are not unfamiliar with Federal criminal practice. Larry

Flax served as Assistant United States Attorney and Assistant Chief of the Criminal Division in the United States Attorney's Office for the Central District of California from 1968 to 1972. From 1969 to 1973 I served with the Appellate Section of the Criminal Division in Washington D.C., then later with the Special Prosecution Section, Criminal Division of the United States Attorney's Office in Los Angeles.

In his letter to your Honor, Mr. Steinberg states on page four:

> "During the course of the conversation Mr. Schulte again alluded to the "client" who did not want Florida Administrators to comply with the subpoena. Mr. Schulte stated that "they" informed Florida Administrators, Inc. that Florida Administrators, Inc. should contest the subpoena or that there might be a civil liability on the part of Florida Administrators, Inc. Mr. Gamble responded that sounded like obstruction of justice—*not on the part of Florida Administrators, Inc.*—but on the part of that person who told Florida Administrators, Inc. not to comply when they were apparently willing to do so. Mr. Gamble asked Mr. Schulte how "they" even knew Florida Administrators, Inc. had been served with a subpoena. To this there was no response. Although no specific names were mentioned Mr. Gamble informed me that it was clear from the conversation that "they" referred to Mr. Bernard Rubin and his attorneys (since the subpoena requests information about disbursements to Mr. Rubin, this is only logical).

Later Mr. Steinberg concludes:

> "In my opinion the Government agents in this particular investigation have acted entirely properly and circumspectly in the face of serious efforts by the subject of the investigation to frustrate that investigation not only with respect to Florida Administrators, Inc., but in many other aspects that this Court is aware of."

My first inquiry is how a Federal Prosecutor could deem it ethically proper to address a letter to a Federal Judge which accuses the subject of a criminal investigation and his attorneys of obstruction of justice, then not serve a copy of that inflammatory statement upon the subject or his attorney. Had it not been for the fact that there is communication between some of the subpoenaed parties in this matter, this letter may never have come to my attention.

If the Florida Administrator's matter was moot at the time this letter was written, as Mr. Steinberg indeed suggests it was, why the necessity for this unverified version of the facts at all? If the purpose of the letter was to vindicate the reputation of William Gamble of the Labor Department, then I suggest that perhaps Mr. Gamble ought be a bit more "thick skinned."

But, Mr. Rubin need not be "thick-skinned." As the target of a serious criminal investigation he had a full right, indeed a full right based on our Constitution —to believe that a prosecutor will not engage in misconduct—whether that misconduct occurs before a Grand Jury, at trial, or in an *ex parte* letter addressed to a District Judge. That expectation has not been fulfilled here.

As put in the oft-quoted statement in *Berger v. United States*, 295 U.S. 88 (1935)

> "The United States Attorney is the representative not of an ordinary party to a controversy but

> of a sovereignty whose obligation to govern impartially is as compelling as an obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Not only is it outrageous that this letter was sent at all, but it is absolutely unture. The facts are as follows: shortly after Florida Administrators, Inc. received their subpoena, Mr. Abe Jordan of that organization telephoned me at my office in Los Angeles. I had never spoken to him or any member of Florida Administrators, Inc. previously. He advised me that he had been served with a subpoena for records concerning Trust Funds associated with Mr. Rubin which were administered by Florida Administrators. He inquired as to what he should do about the subpoena. I advised him that there was nothing that could be done about a Federal Grand Jury Subpoena; that he should comply with the subpoena. The entire conversation including amenities about the weather in Miami probably did not last in excess of one minute. Thereafter, I did not even know that Florida Administrators, Inc. ever filed a motion to quash until I arrived in Miami for Mr. Rubin's Grand Jury appearance on

January 6, 1975. I had never spoken to Mr. Schulte, their attorney, until I arrived outside the Grand Jury room. At that time I introduced myself; our entire conversation concerned Mr. Steinberg's letter to your Honor.

Subsequent to my receiving a copy of the letter, I spoke telephonically with Mr. Steinberg and Mr. Levota of the Strike Force. Mr. Steinberg informed me that the reference in his letter to Bernard Rubin's "attorneys" was not a reference to Mr. Flax and myself, but to another attorney.

I explained that at the time the letter was written Mr. Flax and I were the only attorneys retained to represent Mr. Rubin in this investigation.

Also, I am very troubled by the statement in the letter that there have been ". . . serious efforts by the subject of the investigation to frustrate that investigation, not only with respect to Florida Administrators, Inc., but also in many other aspects that this Court is aware of."

As Mr. Rubin's attorney this allegation truly alarms me. I personally have no knowledge of any improper efforts by Mr. Rubin to frustrate the investigation. To what conduct does Mr. Steinberg refer? Has Mr. Steinberg or any representative of the government had any other *ex parte* communications with the Court? If there have been communications to this Court concerning any conduct of Mr. Rubin, I respectfully request the Court to so advise us. We have not been served by the government with any communication or document in any way whatsoever.

From Mr. Rubin's standpoint, the most troubling aspect is that an allegation of obstruction of justice once

made cannot be retracted. It is an allegation easily made; but it is one that under the circumstances is utterly irresponsible.

The government's allegations of impropriety in the instant case raise even a more profound concern; it is a concern that transcends this case and goes to the core of the administration of Federal criminal justice.

From the first day we undertook representation of Mr. Rubin we have been warned by every attorney with whom we have spoken in Miami (and there have been many) that it is a common tactic of the Miami Strike Force to attempt to intimidate attorneys by alleging they are obstructing justice.

I suspect that the reason that the Strike Force is so carefree about alleging obstruction stems from an unwillingness to recognize the proper role of a defense attorney in the pre-indictment stages of a prosecution. Mr. Steinberg says in his letter that he inquired of Mr. Schulte how "they" even knew Florida Administrators, Inc. had been served with a subpoena. His obvious implication is that there is a sinister connotation to be derived if Florida Administrators, Inc. told Mr. Rubin or his attorneys that they had received a subpoena for records concerning Mr. Rubin. In a similar vein, I had a discussion recently with Mr. Hernan Gonzales, an Internal Revenue Special Agent, assigned to the Strike Force. I had telephoned him concerning an IRS summons issued to Mr. Howard Learner, who previously served as an accountant to Mr. Rubin. Mr. Gonzales inquired how I even knew that Mr. Learner had received a summons. I informed him that Mr. Learner told me.

Then, when I was present in Florida last week, to answer a subpoena for records, I was present at the grand jury room while Mr. Learner testified before the grand jury. When the grand jury adjourned for lunch, in the near presence of Mr. Steinberg, I asked Mr. Learner whether he wished to join Mr. Flax and I for lunch. Mr. Steinberg turned and remarked in an obvious outraged tone, "You mean you're going to interview him right now?". I explained to Mr. Steinberg that I most assuredly was going to interview Mr. Learner.

Apparently, the Strike Force is unwilling to acknowledge that I have the same right to speak to witnesses as they do. If those witnesses wish to speak with me prior to or after their Grand Jury appearances, they may properly do so. Moreover, the fact that a witness must testify truthfully and candidly before the Grand Jury, does not necessarily mean he must be overjoyed about so doing. It is neither improper nor unusual for a Grand Jury witness to communicate with the subject or his attorney.

From my discussions with others I have learned that there has been extensive questioning of Grand Jury witnesses concerning any discussions that such witnesses may have had with various attorneys concerned with this investigation, including myself. I understand that Mr. Schulte has now been subpoenaed as a Grand Jury witness.

This type of attorney-harassment by the Strike Force cannot help but intimidate counsel who are attempting to represent a potential defendant. I cannot help but question whether I am now sufficiently strong to represent my client to the fullest extent to which he is

lawfully entitled. I believe that even the most fearless attorney would be intimidated by the aspersions and allegations being leveled. Such invidious attacks which subvertly erode the Sixth Amendment right to counsel should be a matter of extreme concern to everyone involved in our criminal justice system. Moreover, I am gravely concerned about the effect that this highly inflammatory inquiry will have on a lay Grand Jury who assuredly is not instructed as to the proper latitude given to a subject and his attorney at the pre-indictment stages. The very fact that the prosecutor continues to inquire of Grand Jury witnesses about contacts with the defendant and/or his attorneys necessarily creates the inference that such contact is improper. As a consequence, the Grand Jury can easily be improperly inflamed against Mr. Rubin. The prejudice inherent in such conduct is properly the subject of this Court's supervisory power over the Federal Grand Jury. Mr. Steinberg says, "[a] member of the bar should be more responsible when he files an affidavit that could affect the career of a government agent." I believe that a member of the bar should be more responsible when he files an *ex parte* unverified document with a District Judge that *sub rosa* could seriously affect the subject of an investigation as well as the reputation of other members of the bar. My reason for writing this letter is not to obtain a censure of Mr. Steinberg. I am far more concerned with the rights of Mr. Rubin and to a fair Grand Jury, and to effective counsel. Accordingly, I would

respectfully request this Court to cause further inquiry into this serious matter.

Respectfully,

/s/ Richard L. Rosenfield
RICHARD L. ROSENFIELD
For The Law Firm

RLR/mdlf

cc: The Hon. Charles B. Fulton,
Chief Judge, U.S. District Court

Dougald McMillan, Chief,
Organized Crime and Racketeering
Strike Force—Miami

Marty Steinberg, Special Attorney
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bcc: Seymour Gopman, Esq.
William Meadows, Esq.
Peter Aiken, Esq.